No. 89-22

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

WILLIAM B. KNAPP, M.D., FRANCISCO LOPEZ, M.D., and HUGH SAVAGE, M.D.,

Petitioners,

v.

PALOS COMMUNITY HOSPITAL, SISTER MARGARET WRIGHT, THOMAS LAVERY, PATRICK McCORMACK, M.D., S. CALIENDO, M.D., JOHN MEYER, M.D., and KENNETH WILCOX, M.D.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the willful and malicious termination of hospital staff privileges under the guise of peer review is beyond the scope of substantive judicial review?

2. Whether the doctrine of limited judicial review requires Illinois courts to disregard a legislatively enacted procedural safeguard available to a physician who sues a hospital for a willful and wanton termination of hospital staff privileges?

3. Whether the retroactive application of a state statute granting immunity to hospitals and physicians on peer review boards unconstitutionally impinges upon a physician's rights when that physician has been awarded money damages by a jury for willful and malicious conduct by participants in the peer review process?

LIST OF PARTIES

There are no parties not named in the caption.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW ..	i
LIST OF PARTIES	i
TABLE OF AUTHORITIES	iv
CITATIONS TO OPINIONS BELOW	2
STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED	2
STATUTES INVOLVED IN THIS CASE	2
STATEMENT OF THE CASE	4
ARGUMENT FOR ALLOWING THE WRIT OF CERTIORARI	9
I. THE ISSUES PRESENTED IN THIS CASE HAVE GREAT SIGNIFICANCE IN MOST STATES AND ARE OF WIDE PUBLIC IMPORTANCE	9
II. THE APPELLATE COURT ERRED IN ITS CONCLUSION THAT LIMITED JUDICIAL REVIEW REMOVES SUBJECT MATTER JURISDICTION FROM ILLINOIS COURTS IN REVIEWING A MALICIOUS, WILLFUL AND WANTON TERMINATION OF MEDICAL STAFF PRIVILEGES	12

III.

THE ILLINOIS COURTS COMMITTED GRAVE JUDICIAL ERROR IN REFUSING TO ACKNOWLEDGE THE LEGISLATIVELY ENACTED PROCEDURAL SAFEGUARD AVAILABLE TO A PHYSICIAN UNDER SECTION 2(b) OF THE MEDICAL PRACTICE ACT .. 17

IV.

THE ILLINOIS COURT'S RETROACTIVE APPLICATION OF SECTION 10.2'S ABSOLUTE IMMUNITY UNCONSTITUTIONALLY IMPINGES UPON PETITIONERS' CONSTITUTIONALLY PROTECTED VESTED RIGHTS 23

CONCLUSION 26

APPENDIX

APP. PAGE

A— Order of Illinois Supreme Court denying Petitioners leave to appeal discretionarily and as a matter of right, April 5, 1989 1

B— Opinion of the Illinois Appellate Court, November 30, 1988 2

C— *Knapp v. Palos Community Hospital* (Knapp I), (1984) 125 Ill.App.3d 244, 465 N.E.2d 554 19

TABLE OF AUTHORITIES

Cases	PAGE
Adkins v. Sarah Bush Lincoln Health Center, (1987) 158 Ill.App.3d 982, 511 N.E.2d 1267 ...	12
Barnett v. Barnett, (1948) 336 Ill.App. 601, 84 N.E. 2d 648	25
Board of Education v. Blodgett, (1895) 155 Ill. 441, 40 N.E. 1025	24
Bock v. John C. Lincoln Hospital, (App. Ct. 1985) 145 Ariz. 432, 702 P.2d 253	16
Booth v. Cebula, (1960) 25 Ill.App.2d 411, 166 N.E. 2d 618	25
Country Mutual Insurance Company v. Knight, (1968) 40 Ill.2d 423, 240 N.E.2d 612	25
Darling v. Charleston Community Memorial Hospital, (1965) 33 Ill.2d 326, 211 N.E.2d 253	17
Fahey v. Holy Family Hospital, (1975) 32 Ill.App. 3d 537, 336 N.E.2d 309	13, 14
Gates v. Holy Cross Hospital, (1988) 175 Ill.App.3d 439, 529 N.E.2d 1014	12
Hampton v. Mow Sun Wong, (1976) 426 U.S. 88 .	20
Jain v. Northwest Community Hospital, (1978) 67 Ill.App.3d 420, 385 N.E.2d 108	5, 10, 13, 15
Jenkins v. Wu, (1984) 102 Ill.2d 468, 468 N.E.2d 1162	22
Kiracofe v. Reid Memorial Hospital, (1984 Ind. App.) 461 N.E.2d 1134	16

Knapp v. Palos Community Hospital, (1984) 125 Ill.App.3d 244, 465 N.E.2d 554 ..... 5, 10, 12

Lapidot v. Memorial Medical Center, (1986) 144 Ill. App.3d 141, 494 N.E.2d 838 12

Maimon v. Sisters of Third Order of St. Francis, (1983) 120 Ill.App.3d 1090, 458 N.E.2d 1317 .. 12, 13

Maiter v. Chicago Board of Education, (1980) 82 Ill.2d 373, 415 N.E.2d 522 24

Marroquin-Manriquez v. INS, (1st Cir. 1977) 568 F.2d 803 20

Matviuw v. Johnson, (1979) 70 Ill.App.3d 481, 388 N.E.2d 794 21

Mauer v. Highland Park Hospital Foundation, (1967) 90 Ill.App.2d 409, 232 N.E.2d 776 ... 13, 15

Nagib v. St. Therese Hospital, Inc., (1976) 41 Ill. App.3d 970, 355 N.E.2d 211 13

Patrick v. Burget, (1988) 486 U.S. ____, 108 S.Ct. 1658 9

Rao v. St. Elizabeth's Hospital, (1986) 140 Ill.App. 3d 442, 488 N.E.2d 685 12

Rodriguez-Erdman v. Ravenswood Hospital, (1987) 163 Ill.App.3d 464, 516 N.E.2d 731 ..... 12, 23

Scappatura v. Baptist Hospital of Phoenix, (App. Ct. 1978) 120 Ariz. 204, 584 P.2d 1195 ..... 13, 16

Shulman v. Washington Hospital Center, (D.C. Dist. 1963) 222 F.Supp. 59 13

Settler v. Hopedale Medical Foundation, (1980) 80 Ill.App.3d 1074, 400 N.E.2d 577 13

Smith v. Hill, (1958) 12 Ill.2d 588, 147 N.E.2d 321 . 25

Spencer v. Community Hospital of Evanston, (1980) 87 Ill.App.3d 214, 408 N.E.2d 981 ... 13

Storrs v. Lutheran Hospitals, (Alaska 1980) 609 P.2d 24 ..... 13, 16

Yarnell v. Sisters of St. Francis, (1983 Ind. App.) 446 N.E.2d 359 16

Federal Statutes

Health Care Quality Improvement Act of 1986, Title IV (Encouraging Good Faith Professional Review Activities) of the State Comprehensive Mental Health Services Plan Act of 1986, Pub. L. No. 99.660 (42 U.S.C.A. §§ 11101 *et seq.*) .. 16

State Statutes

Ala. Code § 34-24-58 (1985), § 6-5-333 (Supp. 1986) . 17

Alaska Stat. § 18.23.020 (1986) 17

Ariz. Rev. Stat. Ann. § 36.445.02, § 36-2401, 2402 (Supp. 1986) 17

Ark. Stat. Ann. § 82-3201 *et seq.* (1976) 18

Cal. Health & Safety Code § 1370 (West 1979, Supp. 1987) 18

Cal. Civ. Code § 43.7, 43.8 (Supp. 1987) 18

Col. Rev. Stat. § 12-43.5-103 (1985 and Supp. 1986) . 18

Conn. Gen. Stat. 38-19a (Supp. 1986) 18

Del. Code Ann. tit. 24, § 1768 (1981) 18

D.C. Code Ann. § 32-503 18

Fla. Stat. Ann. § 768.40 (West 1986) 18

Ga. Code Ann. § 31-7-144 to 31-7-143 (1986) § 31-7-132 (New Laws 1987) 18

Hawaii Rev. Stat. § 663-1.7 (1976) 18

Idaho Code Ann. § 39-1392(c), (f) (Supp. 1986) . 18

Ill. Rev. Stat. (1981), ch. 51, par. 101; (*Amended* as Ill. Rev. Stat. (1983), ch. 110, § 8-2101) 2, 21

Ill. Rev. Stat. (1981), ch. 51, par. 102; (*Amended* as Ill. Rev. Stat. (1983), ch. 110, § 8-2102) .. 3, 21, 22

Ill. Rev. Stat. (1985), ch. 111, par. 4406 ..... 3, 19

Ill. Rev. Stat. (1985), ch. 111½, par. 151.2 4

Ill. Rev. Stat., ch. 111½, § 10.2 (Smith-Hurd Supp. 1986) 18, 24

Ind. Ann. Stat. § 16-10-6.5 (Burns 1986) 18

Iowa-None 18

Kan. Stat Ann. § 65-442 (1985) 18

Ky. Rev. Stat. Ann. § 311.377 (1983) 18

La. Rev. Stat. Ann. § 44:7D 18

Mi. Rev. Stat. Ann. tit. 24, § 2511, *as amended by* S.B. No. 576 (New Law 1987) 18

Md. Health Occ. Code § 14-603, as enacted by H.B. No. 393 (New Laws 1988), § 14-603 18

Mass. Gen. Laws Ann. ch. 231, § 85N 18

Mich. Stat. Ann. § 14.15 (16244) 18

Minn. Stat. Ann. §§ 145.61 and 145.63 18

Miss. Code Ann. § 41-63-5 18

Mo. Ann. Stat. § 537.035 (Vernon Supp. 1987) ... 18

Mont. Code Ann. § 37-2-201 (1985) 18

Neb. Rev. Stat. § 71.147.01 18

Nev. Rev. Stat. § 630.364 18

N.H. Rev. Stat. Ann. § 507:8-c (1984) 18

N.J. Stat. Ann. § 2A:84A-22.9 (West Supp. 1986) . 18

N.M. Stat. § 41-9-1 to 41-9-4 (1986) 18

N.Y. Educ. Law § 6527(3) 18

N.C. Gen. Stat. § 131E-95 18

N.D. Cent. Code § 23-01-02.1 18

Ohio Rev. Code Ann. § 2305.24 to 2305.28 (Page Supp. 1985) 18

Okla. Stat. Ann. tit. 63, § 1-1709 (West 1984) ... 18

Or. Rev. Stat. § 41.675(4) (1985) 18

Pa. Stat. Ann. tit. 62, § 444.2, tit. 63, § 425.3 ... 18

R.I. Gen. Laws Ann. § 5-37.3-7 18

S.C. Code Ann. § 40-47-212 18

S.D. Codified Laws Ann. § 36-4-25 18

Tenn. Code Ann. § 63-6-219 (1986) 18

Tex. Rev. Civ. Stat. art. 4447d(3) 18

Utah Code Ann. § 58-12-25 (1986), §§ 26-25-1, 26-25-2 and 58-12-25, *as amended by* S.B. No. 13 (New Laws 1988) 18

Vt. Stat. Ann. tit. 26, § 1442 (Supp. 1986) 18

Va. Code Ann. §§ 8.01-581.13, 8.01-581.16, and 8.01-581.19 (1984) 18

Wash. Rev. Code Ann. §§ 4.24.240 and 4.24.250 (Supp. 1987) and S.B. No. 5972 adopting the Health Care Quality Improv. Act of 1986, P.L. 99-660 18

W.Va. Code Ann. § 30-3C-2 (1975) 18

Wis. Stat. Ann. § 146.37 (West Supp. 1986) ... 18

Wyo. Stat. Ann. §§ 35-2-603 and 36-17-106 (1987) .. 18

Other Authorities

Goldsmith & Bertolet, *The Present Status of Physician Privileges*, 1981 Med. Trial Tech. Q. 121 . 17

H. Ward Classen, *Tying Staff Privileges to Physician Employment Contracts: An Erosion of Due Process Rights or a Necessary Evil*, 18 Seton Hall L.Rev. 4, 25 (1988) 20

IN THE

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST JUDICIAL DISTRICT

Petitioners William B. Knapp, M.D., Francisco Lopez, M.D. and Hugh Savage, M.D. respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Illinois Appellate Court, First Judicial District entered in the above-entitled cause on November 30, 1988.

CITATION TO OPINIONS BELOW

Attached is the April 5, 1989 order of the Illinois Supreme Court denying petitioners leave to appeal (Appendix A) from the opinion of the Illinois Appellate Court, First Judicial District, of November 30, 1988 attached hereto as (Appendix B).

JURISDICTION

The Appellate Court of Illinois issued its decision November 30, 1988. Leave to appeal discretionarily and as a matter of right was denied by the Illinois Supreme Court on April 5, 1989. Jurisdiction in this Court is vested by 28 U.S.C. § 1257(3).

STATUTES INVOLVED

Ill. Rev. Stat. (1981), ch. 51, par. 101; (*amended* as Ill. Rev. Stat. (1983), ch. 110, par. 8-2101) provides:

> All information, interviews, reports, statements, memoranda or other data of the Illinois Department of Public Health, the Illinois Department of Mental Health and Developmental Disabilities, Illinois State Medical Society, allied medical societies, physician-owned interinsurance exchanges and their agents, or committees of licensed or accredited hospitals or their

> medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees and Executive Committees, (but not the medical records pertaining to the patient), used in the course of internal quality control or of medical study for the purpose of reducing morbidity or mortality, or for improving patient care, shall be privileged, strictly confidential and shall be used only for medical research, the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges, except that in any hospital proceeding to decide upon a physician's staff privileges, or in any judicial review thereof, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based. (1983), ch. 110, par. 8-2101.

Ill. Rev. Stat. (1981), ch. 51, par. 102; (*amended* as Ill. Rev. Stat. (1983), ch. 110, par. 8-2102) provides:

> Such information, records, reports, statements, notes, memoranda or other data, shall not be admissible as evidence, nor discoverable in any action of any kind in any court before any tribunal, board, agency or person.

Ill. Rev. Stat. (1985), ch. 111, par. 4406 provides:

> While serving upon any Medical Utilization Committee, Medical Review Committee, Patient Care Audit Committee, Medical Care Evaluation Committee, Quality Review Committee, Credential Committee, Peer Review Committee, or any other committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital duly licensed under the Hospital Licensing Act,[1] or the improving or benefiting of patient care

[1] Chapter 111½, § 142 *et seq.*

and treatment whether within a hospital or not, or for the purpose of professional discipline, any person serving on such committee, and any person providing service to such committees shall not be liable for civil damages as a result of his acts, omissions, decisions, or any other conduct in connection with his duties on such committees, except those involving willful or wanton misconduct.

Ill. Rev. Stat. (1985), ch. 111½, par. 151.2 provides:

No hospital and no individual who is a member, agent, or employee of a hospital, hospital medical staff, hospital administrative staff, or hospital governing board shall be liable for civil damages as a result of the acts, omissions, decisions, or any other conduct of a medical utilization committee, medical review committee, patient care audit committee, medical care evaluation committee, quality review committee, credential committee, peer review committee, or any other committee whose purpose, directly or indirectly, is internal quality control or medical study to reduce morbidity or mortality, or for improving patient care within a hospital, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline. Nothing in this Section shall relieve any individual or hospital from liability arising from treatment of a patient.

STATEMENT OF THE CASE

In December of 1984, a Cook County Circuit Court jury, following eight weeks of testimony, found that Palos Community Hospital ("Palos") and five other named defendants ("respondents" herein) maliciously breached the hos-

pital bylaws in denying privileges and reappointments.[2] The judgment on the verdict awarded Petitioner William B. Knapp, M.D. damages in the amount of $400,000.00.[3] The verdict specifically found that the defendants acted with actual malice, i.e., a reckless disregard for the truth or an intent to harm with knowledge of the false nature of the allegations.

Four years later, the Appellate Court reversed the judgment and award of damages. The Court stated that the rule of limited judicial review established in *Jain v. Northwest Community Hospital*, (1978) 67 Ill.App.3d 420, 385 N.E.2d 108 required the trial court to decline to exercise jurisdiction over plaintiff's cause of action and requests for relief. It based its conclusion on certain promulgated statutory law which the court contended had reaffirmed *Jain*. The Court took this position *sua sponte*. Although the issues were thoroughly briefed by all parties and both *amici curiae*, not one brief urged that the trial court lacked jurisdiction. The effect of this legal finding retroactively deprived petitioners of their judgment for damages.

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[2] The case originally sought injunctive relief. In July of 1982, the trial court entered a preliminary injunction. An appeal followed, and approximately 2 years later the Illinois Appellate Court reversed the entry of same. That case is reported as *Knapp v. Palos Community Hospital*, (1984) 125 Ill.App.3d 244, 465 N.E.2d 554. Since the Appellate Court's opinion sought to be reviewed by the issuance of a writ herein incorporates by reference certain facts set forth in the first opinion, it has been included as Appendix C.

[3] The jury found Palos and several individual defendants liable to plaintiff Knapp on Counts I and II, which alleged willful, wanton and malicious breach of contract. Counts III through VII, variously alleging willful and malicious interference, wrongful inducement, unfair competition, and malicious infliction of severe emotional distress, were directed against plaintiffs by the trial judge at the end of plaintiff's case.

Petitioners William B. Knapp, M.D., Francisco Lopez, M.D. and Hugh Savage, M.D. are licensed physicians and cardiologists engaged in a group medical practice, William B. Knapp and Associates, Inc. (R. 1978-79, 2945-46, 2948-50, 2981, 3019-29, 5661, 5625).[4] Each was also a staff member of Palos until October 23, 1984. (R. 894).

Palos' medical staff is composed of the physicians admitted to the staff under its bylaws. The staff bylaws give Palos the right to conduct regular quality control peer reviews of staff members to determine their fitness for staff reappointment (Px. 1 at 16, R. 908).

The stated purpose of Palos' peer review system[5] is to achieve and maintain certain standards of medical care by providing the hospital directors with "valid and reliable" factual bases upon which to determine staff and clinical privileges. (Px 1 at 2, R. 1073-74). The bylaws expressly contain an extensive procedural agenda designed to ensure the validity and reliability of the peer review process.

Pursuant to the terms of the bylaws, the annual redetermination of staff privileges by a peer review committee lies primarily with review of patient records and charts. (R. 913-16, 4361).

Petitioners' charts were regularly reviewed and regularly accepted by Palos' peer review committees. (R. 3307-08, 3374-75). From 1972 until 1981, each annual staff reapplication was unanimously accepted.

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[4] Support for the factual statements refer to the Illinois Appellate Court Record on Appeal.

[5] Peer review, as it exists at Palos, is modeled in form on the peer review process contained in the Joint Commission on Accreditation of Hospitals ("JCAH") manual.

In 1972, despite a 99.8% chart approval rate, petitioners began to experience adverse criticism unrelated to the provisions and maintenance of quality health care. Certain respondents[6] formed a secret, unauthorized and autonomous "intensive care" committee designed to force petitioners' patients out of Palos' intensive care unit. They also attempted to impose consultation requirements on petitioners regarding certain cardiological procedures, which were later flatly rejected by the medical staff. (R. 4036-37, 4039-41, Px 6, 1-2 at Bates 00005, p. 1). Through the efforts of these respondents, petitioners were also excluded from performing certain cardiological tests they were well qualified to perform. (R. 3681, 3686, 4230-33, 4236, 4238-39).

These respondents also initiated a campaign questioning the quality of petitioners' practice which was later found by an *ad hoc* committee to be excellent.[7]

In 1977, a hospital employee, reporting to certain defendants, started a "hit list." The employee placed petitioners' names on it and initiated a system of daily review of petitioners' charts. In 1978, Defendant Meyer attempted to enlist the aid of a young physician to perform a unilateral and *ex parte* audit of only petitioners' pertinent charts. The physician refused and was later dismissed.

In November of 1981, respondents specifically decided that, irrespective of the outcome of the peer review, petitioners would be denied all privileges. (R. 1028-29). Thus, a random and unprecedented respiratory audit of selected pa-

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[6] Kenneth Wilcox, M.D., John Meyer, M.D. and Patrick McCormack, M.D.

[7] The *ad hoc* committee further ruled that the charges "smack[ed] of vendetta" and cautioned defendants to abandon their unwarranted attacks.

tient charts of petitioners was conducted by Dr. Terrence Moisan. The findings were reviewed and the care was determined to be acceptable by two committees. When it reached respondents' committee, however, it was decided that petitioners' ventilation privileges would be curtailed. In fact, the audit covered none of Dr. Knapp's orders. The decision was not appealable. Consequently, petitioners filed suit.

In retaliation for taking this legal action, respondents accelerated their effort to dismiss petitioners from the hospital staff entirely. (P. Ex. 23 at 5-8). At the February 10, 1982 Privilege Evaluation Committee ("PEC") meeting, the respondents, without notice, presented another "audit" conducted by an outside physician who concluded that petitioners' medical care fell below acceptable standards. (R. 5266-67, Pl. Ex. 23 at 5-8). The audit was replete with inaccuracies. (R. 1412, Scheiner Dep. at 32, 43, 49, 67, 71, 97, 146). Nevertheless, respondents denied Dr. Lopez his right to vote and relied on this bare-bones audit in voting against and denying petitioners' request for reappointment. This irregular turnabout came after the PEC had approved petitioners' reappointments just two weeks before. (Pl. Ex. 24).

From there, on up the "peer review" ladder, the various committees authorized to reconsider the findings merely acquiesced in the findings of the committee below. No committee member considered any of petitioners' patient charts in the peer review process. The Board of Directors, relying on the lower committee's cursory reviews, without reviewing the patient charts itself, and limiting its concern to the pending lawsuit, voted to oust petitioners from the staff.

ARGUMENT FOR ALLOWING THE WRIT OF CERTIORARI

In the case of *Patrick v. Burget*, (1988) 486 U.S. ____, 108 S.Ct. 1658, this Court held that the state action doctrine did not protect peer review activities in the state of Oregon from antitrust laws. This Court discussed immunity from antitrust scrutiny and upheld a significant judgment obtained by a physician against bad faith peer review. This Honorable Court discussed the elements of proper peer review. Although not specifically ruling on the necessary components, the Court set forth certain of the minimum requirements. This case presents to the Court the issue of whether bad faith and malicious peer review can be placed beyond the scope of any form of judicial review. Illinois now provides no judicial protection to a physician victimized by any malicious, wanton, or discriminatory conduct. This case deals with a physician victimized by a hospital. The verdict awarded damages as a consequence. The Illinois Appellate Court held that all peer review, no matter how distorted, carries absolute immunity and that immunity is applied retroactively.

I.

THE ISSUES PRESENTED IN THIS CASE HAVE GREAT SIGNIFICANCE IN MOST STATES AND ARE OF WIDE PUBLIC IMPORTANCE.

The issues presented by this case are of great significance not only to the petitioners and the health care community in Illinois, but to all states that mandate peer review in private state-licensed hospitals. This case is ideally suited for review since the decision announced herein goes further to deplete the protectable due process

rights of physicians than any decision in Illinois or elsewhere. In Illinois, as in many states, the staff decisions of private hospitals are only reviewable if an individual is attempting to establish that his termination was not in accord with that hospital's bylaws. See *Jain v. Northwest Community Hospital*, (1978) 67 Ill.App.3d 420, 385 N.E.2d 108; *Knapp v. Palos Community Hospital*, (1984) 125 Ill.App.3d 244, 465 N.E.2d 554. This doctrine is known as "limited judicial review."

The precise scope of this review has not been applied uniformly by courts which follow the doctrine. Yet in almost all instances it has been interpreted in a way which ensures the protection of a physician's due process rights. Thus, most jurisdictions have allowed access to the courts where a hospital has not substantively or procedurally followed its own bylaws in terminating a physician's staff privileges.

Illinois, through the Supreme Court's denial of petitioners' request for review of the Appellate Court's pronouncement, has abandoned any notion of even minimally protecting physicians' rights. Limited judicial review, as interpreted by the Illinois courts, now merely provides an aggrieved physician only half a remedy: review only to the extent of determining whether a hospital procedurally complied with its bylaws. There is no judicial relief if a hospital is found to have substantively ignored its bylaws in terminating a physician's staff privileges, as occurred in this case. The limited review afforded in Illinois now tracks the technicalities of having the correct number of committees with the correct number of doctors sitting thereon. It is powerless, however, to prevent a vote by physicians made in bad faith against their conscience. It is illusory. The judicial remedy is hollow. It neither pro-

vides a physician with his staff privileges, nor with adequate relief when those privileges are wrongfully, wantonly, or maliciously terminated. To allow this interpretation of "limited judicial review" to stand will result in the greatest triumph form ever had over substance.

The Illinois Court's decision marks a radical departure from long-standing practice. The recent decision ignores the legislative reference to a guarantee safeguarding a physician's due process rights. The Appellate Court denied applicability of the Medical Practice Act, which provides immunity to physicians engaged in peer review only if the decision to terminate is not the result of willful and wanton misconduct. Petitioners' cause of action is based on this Act and the jury found that the decision to terminate was the result of malicious, willful, and wanton misconduct. The Illinois Courts' justification for not recognizing the Act's applicability is inconsistent with the legislative intent and is also grounded in clearly erroneous statutory construction.

The Illinois Courts' new position in this area has profound and serious consequences for physicians in Illinois (and in other states that are presently seeking out the parameters of "limited judicial review"). Not only does it deny aggrieved physicians effective equitable and all legal relief by the courts, it also eviscerates legislative protections which were once available to physicians. This leaves hospital staff physicians at the whim and mercy of bad faith and malicious medical peer review boards. How can this outcome aid health care in Illinois or any state in the union?

II.

THE APPELLATE COURT ERRED IN ITS CONCLUSION THAT LIMITED JUDICIAL REVIEW REMOVES SUBJECT MATTER JURISDICTION FROM ILLINOIS COURTS IN REVIEWING A MALICIOUS, WILLFUL AND WANTON TERMINATION OF MEDICAL STAFF PRIVILEGES.

The decision of the Appellate Court and its implicit adoption by the Illinois Supreme Court is without parallel in Illinois or in the other jurisdictions which subscribe to the doctrine of limited judicial review. Its conclusion that courts in Illinois no longer have jurisdiction to entertain any of the claims of petitioners is unfair and unjust, not only to the petitioners, but to all physicians who find it necessary to practice in hospitals to fulfill their commitment to correct the physical and psychological illnesses in this society. The decision has effectively removed any of the limited protections physicians have under the existing law and makes them controlled victims of any improper conduct hospitals and other physicians desire to visit upon them.

In addition, the Appellate Court has, for the first time in the reported decisions in this state,[8] withdrawn sub-

[8] There are no reported Illinois cases which hold that limited judicial review bars a court from entertaining causes of action and requests for relief by plaintiff-physicians on jurisdictional grounds. Indeed all seem to suggest the opposite. See, *Gates v. Holy Cross Hospital*, (1988) 175 Ill.App.3d 439, 529 N.E.2d 1014; *Rodriguez-Erdman v. Ravenswood Hospital*, (1987) 163 Ill.App.3d 464, 516 N.E.2d 731; *Adkins v. Sarah Bush Lincoln Health Center*, (1987) 158 Ill.App.3d 982, 511 N.E.2d 1267; *Lapidot v. Memorial Medical Center*, (1986) 144 Ill.App.3d 141, 494 N.E.2d 838; *Rao v. St. Elizabeth's Hospital*, (1986) 140 Ill.App.3d 442, 488 N.E.2d 685; *Knapp v. Palos Community Hospital*, (1984) 125 Ill.App.3d 244, 465 N.E.2d 554; *Maimon v. Sisters of Third Order of St. Francis*,

(Footnote continued on following page)

ject matter jurisdiction from claims of physicians that hospitals have willfully failed to follow their own bylaws in removing their hospital privileges. Its position that *Jain v. Northwest Community Hospital*, (1978) 67 Ill.App.3d 420, 385 N.E.2d 108 authorizes withdrawal of subject matter jurisdiction from these claims is unsupported by logic or prior case law. The Petitioners submit that the Appellate Court has utterly mischaracterized the principle of limited judicial review.

Illinois courts and the majority of other state courts allow private hospitals to act freely in deciding which physicians will be granted staff privileges. *Mauer v. Highland Park Hospital Foundation*, (1967) 90 Ill.App.2d 409, 232 N.E.2d 776, *citing Shulman v. Washington Hospital Center*, 222 F.Supp. 59 (D.C. Dist. 1963). The basic rationale behind the rule is the court's unwillingness to substitute its judgment for that of the private hospital authorities. 90 Ill.App.2d 409, 415. The only qualification to the rule of non-review that has developed in Illinois, and in at least three other states,[9] is that a hospital must follow its own bylaws in reducing or revoking staff privileges or be subject to limited judicial review. *Jain v. Northwest Community Hospital*, (1978) 67 Ill.App.3d 420, 385 N.E.2d 108; *Nagib v. St. Therese Hospital, Inc.*, (1976) 41 Ill.App.3d 970, 355 N.E.2d 211; *Fahey v. Holy Family Hospital*,

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[8] *continued*

(1983) 120 Ill. App.3d 1090, 458 N.E.2d 1317; *Spencer v. Community Hospital of Evanston*, (1980) 87 Ill.App.3d 214, 408 N.E.2d 981; *Settler v. Hopedale Medical Foundation*, (1980) 80 Ill.App.3d 1074, 400 N.E. 2d 577.

[9] Arizona: *Scappatura v. Baptist Hospital of Phoenix*, (App. Ct. 1978) 120 Ariz. 204, 584 P.2d 1195; Indiana: *Kiracofe v. Reid Memorial Hospital*, (1984 Ind. App.), 461 N.E.2d 1134; Alaska: *Storrs v. Lutheran Hospitals*, (Alaska 1980) 609 P.2d 24.

(1975) 32 Ill.App.3d 537, 336 N.E.2d 309. This qualification, however, must be read to include a substantive review. Surely the courts do not intend for only procedural safeguards to apply?

Allowing physicians access to the courts in no way contradicts the state policy of prohibiting courts from substituting its judgment for that of private hospitals. If a physician alleges, as occurred here, that a hospital violated its bylaws in terminating his staff privileges, the court's point of inquiry should be directed at the entire scope of the termination process. It will not need to specifically consider every aspect of the quality of the particular physician's patient care. These are determinations which petitioners concede lie solely in the hospital's peer review capacity. The issue of whether or not the hospital followed its bylaws, both procedurally and substantively, is another matter.

The petitioners here not only charged non-compliance with the bylaws, but the jury found there was a willful and malicious failure to comply. At trial, the line of inquiry upon these issues was not directed at the medical and scientific basis for the hospital's medical judgment. The jury and the judge were able to determine that an honest and fair minded evaluation did not occur. The Appellate Court has now given Illinois hospitals absolute power in the granting or denying of hospital staff privileges.

Accepting the Appellate Court's contention that judicial review should be limited to procedural compliance with bylaws results in physicians effectively receiving no relief. According to the Appellate Court, a hospital can willfully violate medical staff bylaws, not give fair or honest consideration to any issues, yet by convening the correct

number of committees be absolutely immune from sanction. What purpose is there, then, for limited judicial review under the Appellate Court's decision? Should the court only count committees and appeal times while ignoring obvious and blatant bad faith and even discrimination? What the court has actually done is throw Illinois law back to its earlier policy (relating to a physician's initial staff appointment) of total non-review, a policy which was explicitly expanded upon in *Jain* and *Mauer* in the form of limited judicial review.[10]

The understanding of the doctrine expressed by petitioners is, as stated, consistent with Illinois policy and does not construe limited judicial review as non-review. Illinois courts have, prior to this case, allowed civil cases to proceed in light of the doctrine,[11] thereby implicitly recognizing its jurisdictional validity. None, however, have directly addressed the issue in the same manner as the Illinois Appellate Court involved below. This does not, however, mean we are without guidance.

Arizona also adheres to the limited judicial review doctrine. The First District Appellate Court in Arizona specifically addressed the issue of whether it had jurisdiction to review a claim of damages by a physician against a private hospital. The court initially noted that generally such decisions are not reviewable. However, it went on to state that "The general rule of non-review did not

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[10] See *Mauer v. Highland Park Hospital Foundation*, *supra*, "It is a well settled rule that a private hospital has the right *to refuse to appoint* a physician or surgeon to its medical staff, and this refusal is not subject to judicial review; the decision of the hospital authorities in such matters is final." (Citations omitted) (emphasis added).

[11] See footnote 8 on pages 12-13.

apply where, as here, there is a claim that the hospital did not conform to its own procedural requirements as delineated in its constitution, bylaws, or rules and regulations." *Scappatura v. Baptist Hospital of Phoenix*, (App. Ct. 1978) 120 Ariz. 204, 584 P.2d 1195. Another Arizona case wherein a physician sued for damages cited the same general rule and held that "upon a factual finding that the hospital breached its own procedural requirements, we have full authority to consider the case." *Bock v. John C. Lincoln Hospital*, (App. Ct. 1985) 145 Ariz. 432, 433, 702 P.2d 253, 254.

Indiana and Alaska also follow the doctrine of limited judicial review and have allowed similar cases to proceed to trial to determine whether a given hospital complied with its bylaws in terminating or suspending a physician's staff privileges. *Kiracofe v. Reid Memorial Hospital*, (1984) Ind.App. 461 N.E.2d 1134; *Yarnell v. Sisters of St. Francis*, (1983) Ind.App. 446 N.E.2d 359; *Storrs v. Lutheran Hospitals*, (Alaska 1980) 609 P.2d 24. Neither of these jurisdictions, however, have discussed the doctrine in a jurisdictional sense.

Finally, no less than the United States Congress, by enacting the Health Care Quality Improvement Act, 42 U.S.C.A. §§ 11101 *et seq.* has recognized the requirement that medical staff peer review be subject to due process and fundamental fairness. As this Court is very much aware, the Act conditions immunity on reasonableness.

The Appellate Court's decision cannot stand. It overrules established precedent in the State of Illinois. The interpretation the court makes with regard to limited judicial review only leaves empty handed those physicians who are maliciously and willfully terminated from hospital staffs. Further, it seriously impinges on their fundamental due process rights.

III.

THE ILLINOIS COURTS COMMITTED GRAVE JUDICIAL ERROR IN REFUSING TO ACKNOWLEDGE THE LEGISLATIVELY ENACTED PROCEDURAL SAFEGUARD AVAILABLE TO A PHYSICIAN UNDER SECTION 2(b) OF THE MEDICAL PRACTICE ACT.

Peer review is the process by which a hospital decides which physicians shall be reappointed to a hospital staff and the scope of their privileges on the staff. That decision is made on behalf of the hospital by the other physicians who have hospital privileges.

In any privilege decision, the hospital and its physicians represent competing factors. Physicians want hospitals to approve their applications for staff privileges, for as commentators have noted, a "physician without privileges, is almost certain to become a physician without patients."[12] Hospitals seek to provide the best staff of physicians qualified in order to, among other things, avoid liability to patients resulting from physician malpractice where the hospital was negligent in allowing a delinquent physician to remain on staff.[13] The way to realize these interests is through honest and fair peer review.

Peer review is widespread because it is one means of protecting the public from incompetent or negligent physicians. Forty-nine states, therefore, either require or provide for peer review in hospitals licensed by the state.[14]

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[12] Goldsmith & Bertolet, *The Present Status of Physician Privileges*, 1981 Med. Trial Tech. Q. 121.

[13] *Darling v. Charleston Community Memorial Hospital*, (1965) 33 Ill.2d 326, 211 N.E.2d 253, *cert. denied*, 383 U.S. 946 (1966).

[14] Ala. Code § 34-24-58 (1985), § 6-5-333 (Supp. 1986); Alaska Stat. § 18.23.020 (1986); Ariz. Rev. Stat. Ann. § 36.445.02, § 36-2401, 2402

(Footnote continued on following page)

Likewise, the verdict in this case dictates that one recognize the possibility that peer review may sometimes be perverted for the selfish ends of participants. It is uncontroverted by the Appellate Court opinion that peer review was improperly utilized to eliminate qualified but unpopular physicians from the medical staff in this case. Forty-five of the fifty states in the union, therefore, grant only a

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[14] *continued*

(Supp. 1986); Ark. Stat. Ann. § 82-3201 *et seq.* (1976); Cal. Health & Safety Code § 1370 (West 1979, Supp. 1987); Cal. Civ. Code § 43.7, 43.8 (Supp. 1987); Col. Rev. Stat. § 12-43.5-103 (1985 and Supp. 1986); Conn. Gen. Stat. 38-19a (Supp. 1986); Del. Code Ann. tit. 24, § 1768 (1981); D.C. Code Ann. § 32-503; Fla. Stat. Ann. § 768.40 (West 1986); Ga. Code Ann. § 31-7-144 to 31-7-143 (1986), § 31-7-132 (New Laws 1987); Hawaii Rev. Stat. § 663-1.7 (1976); Idaho Code Ann. § 39-1392(c), (f) (Supp. 1986); Ill. Rev. Stat., ch. 111½, § 10.2 (Smith-Hurd Supp. 1986); Ind. Ann. Stat. § 16-10-6.5 (Burns 1986); Iowa-None; Kan. Stat Ann. § 65-442 (1985); Ky. Rev. Stat. Ann. § 311.377 (1983); La. Rev. Stat. Ann. § 44.7D; Mi. Rev. Stat. Ann. tit. 24, § 2511, *as amended by* S.B. No. 576 (New Law 1987); Md. Health Occ. Code 14-603, as enacted by H.B. No. 398 (New Laws 1988); § 14-603; Mass. Gen. Laws Ann. ch. 231, § 85N; Mich. Stat. Ann. § 14.15 (16244); Minn. Stat. Ann. §§ 145.61 and 145.63; Miss. Code Ann. § 41-63-5; Mo. Ann. Stat. § 537.035 (Vernon Supp. 1987); Mont. Code Ann. § 37-2-201 (1985); Neb. Rev. Stat. § 71.147.01; Nev. Rev. Stat. § 630-364; N.H. Rev. Stat. Ann. § 507:8-c (1984); N.J. Stat. Ann. § 2A:84A-22.9 (West Supp. 1986); N.M. Stat. § 41-9-1 to 41-9-4 (1986); N.Y. Educ. Law § 6527(3); N.C. Gen. Stat. § 131E-95; N.D. Cent. Code § 23-01-02.1; Ohio Rev. Code Ann. § 2305.24 to 2305.28 (Page Supp. 1985); Okla. Stat. Ann. tit. 63, § 1-1709 (West 1984); Or. Rev. Stat. § 41.675(4) (1985); Pa. Stat. Ann. tit. 62, § 444.2, tit. 63, § 425.3; R.I. Gen. Laws Ann. § 5-37.3-7; S.C. Code Ann. § 40-47-212; S.D. Codified Laws Ann. § 36-4-25; Tenn. Code Ann. § 63-6-219 (1986); Tex. Rev. Civ. Stat. art. 4447d(3); Utah Code Ann. § 58-12-25 (1986) and §§ 26-25-1, 26-25-2 and 58-12-25, *as amended by* S.B. No. 13 (New Laws 1988); Vt. Stat. Ann. tit. 26, § 1442 (Supp. 1986); Va. Code Ann. § 8.01-581.13, 8.01-581.16, and 8.01-581.19 (1984); Wash. Rev. Code Ann. §§ 4.24.240 and 4.24.250 (Supp. 1987) and S.B. No. 5972 adopting the Health Care Quality Improv. Act of 1986, P.L. 99-660; W.Va. Code Ann. § 30-3C-2 (1975); Wis. Stat. Ann. § 146.37 (West Supp. 1986); Wyo. Stat. Ann. §§ 35-2-603 and 36-17-106 (1987).

limited immunity to participants and refuse to protect them if they act in bad faith, unreasonably, intentionally or with malice or fraud.[15] At the time this case arose, Illinois counted itself among those states.

In implicit recognition of the competing interests at play in a hospital privilege proceeding between a hospital and a physician, Illinois enacted Section 2(b) of the Medical Practice Act.[16] The Act provides:

> While serving upon any Medical Utilization Committee, Medical Review committee, Patient Care Audit Committee, Medical Care Evaluation Committee, Quality Review Committee, Credential Committee, Peer Review Committee, or any other committee whose purpose, directly or indirectly, is internal quality control * * *, or for improving patient care within a hospital duly licensed under the Hospital Licensing Act, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline, any person serving on such committee, and any person providing service to such committees shall not be liable for civil damages as a result of his acts, omissions, decisions, or any other conduct in connection with his duties on such committees, except those involving willful or wanton misconduct." (Ill. Rev. Stat. 1985, ch. 111, par. 4406.)

The Act protects a hospital and its staff members who sit on the peer review panel from civil liability for their committee actions, but not for actions which are the result of willful and wanton misconduct. A physician afforded this window of protection, can be assured that, at a minimum, his staff privileges will not be revoked arbitrarily.

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[15] See statutes cited in footnote 14.

[16] The Medical Practice Act was repealed on December 31, 1987, but was in full force and effect at the time this litigation arose.

Some states have effectuated the same result through their common law by requiring that terminations of staff privileges not be arbitrary or capricious.[17] The Illinois General Assembly took it upon itself to make that policy law by enacting Section 2(b). During the floor debates attendant to the passage of this Act, it was noted that "at the minimum [the Act] would protect a physician from an unconstitutional deprivation of his rights"[18] and still allow hospitals great deference and latitude in deciding whether to grant staff privileges.

Despite the articulated state policy at the heart of Section 2(b), the Illinois judiciary has refused to recognize its application here. It does not give deference to hospitals as intended by the legislature, but instead gives absolute immunity. The Appellate Court, in effect, has attempted to eliminate the protection from willful and wanton misconduct which has been expressly granted to physicians in these cases. By doing so, it has invaded the province of the legislature and questioned its legislative wisdom by striking out retroactively petitioners' cause of action. Its basis for doing so fails entirely.

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[17] These states are California, New Jersey, New Mexico, Delaware, New Jersey, and Hawaii.

[18] Every individual has a constitutionally protected right of due process, *Hampton v. Mow Sun Wong*, (1976) 426 U.S. 88; *Marroquin-Manriquez v. INS*, (1st Cir. 1977) 568 F.2d 803 and even though Palos is a "private" actor and thus does not meet the state action requirement for invoking due process protections, any action to reduce a physician's due process rights should be closely scrutinized. See H. Ward Classen, *Tying Staff Privileges to Physician Employment Contracts: An Erosion of Due Process Rights or a Necessary Evil*, 18 Seton Hall L. Rev. 4, 25 (1988).

The Appellate Court in its opinion concludes that a claim of willful and wanton misconduct under Section 2(b) cannot be based on oral or written statements made by physicians and others participating in the peer review process since those statements are "privileged, confidential, undiscoverable, and inadmissible as evidence 'in *any* action of *any* kind in *any* court' " (emphasis in original), Opinion at 20, *citing* Ill. Rev. Stat. (1983), ch. 110, par. 8-2101 and 8-2102. The Court claims the language is contradictory. A comprehensive review reveals that there is no conflict between the two statutes. One statute (Section 8-2102) concerns the discoverability and admissibility of statements in their procedural sense, i.e., is the information discoverable and can a plaintiff introduce evidence at a trial? The other statute, (Section 2(b)), which the Appellate Court strikes down, acknowledges the existence of a cause of action for willful and wanton misconduct. How a plaintiff proves his case is entirely another matter. In fact, in the instant case, petitioners were precluded from offering any documents or evidence pursuant to section 8-2102, and still proceeded to prosecute their claims under section 2(b). It was only respondents' waiver and introduction of medical charts that opened the door for petitioners to utilize the information at trial.

Section 8-2102 and Section 2(b) are entirely consistent and their respective legislative objectives will reveal that they do, in fact, lie with each other. The Studies Act expressly allows a doctor who is seeking judicial review regarding the revocation of his staff privileges access to privileged information. The general purpose of the Studies Act is to protect the confidentiality of statements made before a review committee. *Matviuw v. Johnson*, (1979) 70 Ill.App.3d 481, 388 N.E.2d 794. However, Section 8-2102 goes on to state, ". . . the claim of confidentiality shall

not be invoked to deny a physician access to or use of data upon which a decision regarding his staff privileges was based or in any judicial review thereof . . . ." Ill. Rev. Stat., ch. 110, Section 8-2102 (1983). This exception expressly provides that the Studies Act may not be invoked to prevent individuals, like the petitioners, from access to records upon which a decision regarding their staff privileges was based. The Illinois Supreme Court stated in *Jenkins v. Wu*, (1984) 102 Ill.2d 468, 468 N.E.2d 1162, 1167:

> Under Section 8-2102, a physician can gain access to review committee information only in the limited circumstances of a "hospital proceeding to decide upon a physician's staff privileges, or in any judicial review thereof . . . ." (Ill. Rev. Stat. 1983, ch. 110, ¶ 8-2102.) This exception was perceived by the legislature to be necessary in order to protect the due process rights of physicians. During floor debates on the 1975 amendments to the Act, Representative James Houlihan stated: "The purpose of this amendment here is to provide elementary due process for such a physician in his concern, of course, for his staff privileges." (Floor Debate, 79th Gen. Assembly, House, June 10, 1976, at 16).

The court continued by stating the obvious: that information concerning the committee meeting would be "essential to the physician's claim." 468 N.E.2d at 1168. The court then stated:

> . . . if a physician were denied information relating to the reason for his dismissal, he would be unable to challenge an adverse decision. In recognition of the physician's need for this information, the legislature drafted this exception. Indeed, if the legislature had not so provided, the statute's validity might well be questioned under the due process clause.

The Appellate Court's decision removing subject matter jurisdiction from the process has, in effect, reversed the Illinois Supreme Court decision in *Jenkins*. Its conclusion is not only illogical in this context, but is contrary to the express language and policy of the statute.

It is clear that the petitioners' use of the information was within, and authorized by, the Studies Act. It is equally clear that Section 2(b) does not grant immunity from civil action to physicians and hospitals when they engage in willful or wanton misconduct. Taken together, the Acts are compatible: a physician has access to records under Section 8-2102 to prosecute his claim that the reduction or termination of his staff privileges were the result of willful and wanton misconduct pursuant to Section 2(b). This construction is consistent with the terms of the statute and the legislative policy protecting physicians' due process rights. The Appellate Court should have construed the statutes in a consistent fashion since it was reasonable and clearly intended.

IV.

THE ILLINOIS COURTS' RETROACTIVE APPLICATION OF SECTION 10.2'S ABSOLUTE IMMUNITY UNCONSTITUTIONALLY IMPINGES UPON PETITIONERS' CONSTITUTIONALLY PROTECTED VESTED RIGHTS.

The courts in Illinois have settled on a policy that, absent expressed statutory language, statutes are ordinarily construed as being prospective in their operation. *Rodriquez-Erdman v. Ravenswood Hospital*, (1987) 163 Ill. App.3d 464, 576 N.E.2d 731. The courts recognize that in some instances, an amendatory act may be applied retroactively. However, this occurs only when the statute affects the remedy or law of procedure; that is, unless such application of the change of procedure or existing remedies re-

sults in deprivation of a vested right. *Maiter v. Chicago Board of Education*, (1980) 82 Ill.2d 373, 415 N.E.2d 522.

Section 10.2 of the Illinois Hospital Licensing Act, which was enacted in 1985, after occurrence of the events at issue here, undeniably affects more than the remedy or law of procedure. That amendatory Act's sweeping language and grant of immunity affects more than a remedy or a change of procedure. It has the potential to eliminate the substantive right of a party to maintain any cause of action against a hospital or physician. On this basis alone, the Illinois Courts' retroactive application of Section 10.2 was clearly erroneous.

Despite the Illinois Court's failure to recognize this distinction, petitioners submit that the specific retroactive application of this amendatory Act amounts to a complete abrogation of a constitutionally protected vested right to a judgment.

Retroactivity and vested rights have been the subject of much litigation and scholarly review. The traditional view in Illinois relating to the retroactive application of statutes to eliminate property rights was first stated in *Board of Education v. Blodgett*, (1895) 155 Ill. 441, 40 N.E. 1025. In that case, the Court held that the retroactive application of a law extending the statute of limitations so as to destroy a defense which arose after the original statute of limitations ran was a violation of a vested right.

This concept of property in a constitutional sense has been reaffirmed consistently in the courts of Illinois since the time of the *Blodgett* decision, and where a retroactive application of a statute has contravened vested property rights, the courts have unhesitatingly acted to protect

those rights. See *Booth v. Cebula*, (1960) 25 Ill.App.2d 411, 166 N.E.2d 618 (covenants and leases voiding exculpatory clauses); *Country Mutual Insurance Company v. Knight*, (1968) 40 Ill.2d 423, 240 N.E.2d 612 (statute of limitations). The question of whether a judgment is a vested right has been specifically addressed by the courts in Illinois.

The Illinois Supreme Court in *Smith v. Hill*, (1958) 12 Ill.2d 588, 147 N.E.2d 321 stated unequivocally, with respect to the retroactive application of statutes, that a plaintiff, when he has suffered an injury, is entitled to a cause of action for damages actually sustained. "[A] vested right to . . . exemplary damages . . . arises only when such damages have been allowed by a judgment in the plaintiff's favor." 12 Ill.2d 588, 595 (1958). See *Barnett v. Barnett*, (1948) 336 Ill.App. 601, 84 N.E.2d 648.

In the case before this Court, the jury found that the respondents willfully breached certain contract rights and accordingly awarded a $400,000 verdict for consequential damages. The judgment was upheld upon a post-trial motion. Nevertheless, the Appellate Court *sua sponte* applied the immunity statute retroactively, refused to recognize the statutory basis of petitioners' cause of action (Section 2(b)), and extinguished the judgment. The Illinois Supreme Court refused to review the Appellate Court's unprecedented action. A clearer example of an unconstitutional abrogation of a vested right can scarcely be imagined.

CONCLUSION

For these reasons, William B. Knapp, M.D., Francisco Lopez, M.D., and Hugh Savage, M.D. respectfully ask that this Court issue a writ of certiorari to the Appellate Court of Illinois and consider this matter.

Respectfully submitted,

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APPENDICES

APPENDIX A

Order of the Supreme Court of Illinois Denying Leave to Appeal

(Letterhead Of)

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

April 5, 1989

Mr. Stephen P. Carponelli
Carponelli, Krug & Lerum
55 W. Monroe St.
Chicago, IL 60603

No. 68252–William B. Knapp, M.D., et al., etc., petitioners, v. Palos Community Hospital, et al., etc., respondents. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for appeal as a matter of right or leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 27, 1989.

APPENDIX B

Opinion of the Appellate Court of Illinois
First District, Third Division
Nos. 84-3004, 85-0218, 85-0917 Consolidated
[Filed November 30, 1988]

WILLIAM B. KNAPP, M.D., FRANCISCO LOPEZ, M.D., and HUGH SAVAGE, M.D.,

Plaintiffs-Appellants, Appellees,

v.

PALOS COMMUNITY HOSPITAL, SISTER MARGARET WRIGHT, THOMAS LAVERY, PATRICK McCORMICK, M.D., S. CALIENDO, M.D., and JOHN MEYER, M.D.,

Defendants-Appellees, Appellants.

On Appeal from the Circuit Court of Cook County.
Honorable Warren D. Wolfson, Judge Presiding.

JUSTICE FREEMAN delivered the opinion of the Court:

This litigation arises from the termination by defendant, Palos Community Hospital (Palos), of the medical staff privileges of the plaintiffs, William B. Knapp, M.D., Francisco Lopez, M.D., and Hugh Savage, M.D. This is the second appeal arising from this litigation. A different panel of this division of the Appellate Court, First District previously held that the trial court had abused its discretion in granting plaintiffs a preliminary injunction prohibiting Palos from denying them reappointment to its medical

staff because plaintiffs had not shown a likelihood of success on the merits. (*Knapp v. Palos Community Hospital* (1984), 125 Ill. App. 3d 244, 465 N.E.2d 554.) By the time the mandate of this court was returned to the circuit court, after leave to appeal to the supreme court had been denied, this cause had proceeded to a jury trial on the second amended complaint. At the conclusion of the trial, the jury returned a verdict for Dr. Knapp against Palos and certain individual defendants and awarded him $400,000 in damages.

The facts underlying this litigation have been amply set forth and discussed in our prior opinion (hereinafter *Knapp* I) and will be repeated here only insofar as necessary. Plaintifffs are cardiologists engaged in a group practice. All three were employed by William B. Knapp and Associates, Inc. As members of Palos' medical staff, plaintiffs had the privilege of admitting patients, receiving treatment referrals from other physicians for patients already admitted, ordering tests and conducting surgery. All medical staff members are subject to an annual peer review process, governed by the medical staff bylaws, to determine their fitness for staff reappointment. The annual redetermination of staff privileges and the increase or curtailment thereof at other times is based on the direct observation of care provided by the applicant through: (1) a review of the records of patients treated by him at Palos or other hospitals; (2) a review of the medical staff's evaluations of the applicant's participation in the delivery of medical care; and (3) other pertinent information concerning clinical performance obtained from reliable sources.

The bylaws provide the following procedures in the annual reapplication process. The first step in that process is a review of all pertinent information on an applicant for reappointment by the Privilege Evaluation Committee of the department in which the applicant holds privileges and a recommendation by that body to the department chairman. Next, the members of the department either approve or disapprove the recommendation by majority vote and the chairman submits both recommendations to

the Medical Executive Committee. If that committee's findings are favorable to the applicant, they are forwarded to Palos' Board of Directors; if its findings are adverse to him, the applicant is entitled to notice and a hearing before an Ad Hoc Hearing Panel which reports its decision and findings back to the Medical Executive Committee. That committee forwards its findings to the Board of Directors. If the board's decision is adverse to the applicant, he is entitled to a hearing before an Appellate Review Committee which may refer the matter back to an appropriate body for further investigation and review or recommend affirmance, modification or reversal of the adverse decision to the Board of Directors for the ultimate disposition of the application.

Plaintiffs' original complaint alleged that their medical staff privileges to write orders for ventilation therapy had been wrongfully curtailed. The trial court granted plaintiffs a temporary restraining order prohibiting defendants from denying them reappointment to the medical staff. Plaintiffs then amended the complaint to allege that Palos had violated its bylaws in denying them reappointment. Thereafter, the trial court dissolved the temporary restraining order and entered a preliminary injunction reinstating plaintiffs to the medical staff. Defendants appealed the preliminary injunction and this court reversed the order of the trial court. This court held that, as Palos had not violated its bylaws in denying plaintiffs reappointment, its actions were not subject to judicial review and that, therefore, the trial court's order was an abuse of discretion since plaintiffs had not established a likelihood of success on the merits.

After defendants had appealed the preliminary injunction, plaintiffs filed a seven-count, second amended complaint on which this cause proceeded to trial. All seven counts are predicated on defendants' alleged violation of the medical staff bylaws in denying plaintiffs reappointment to Palos' medical staff. Counts I and II allege wilful, wanton and malicious breaches of contract; Count III alleges wilful, wanton and malicious interference with plain-

tiffs' rights to practice medicine; Count IV alleges wilful, wanton and malicious injury to plaintiffs by the individual defendants' inducement of Palos to withhold staff privileges; Count V alleges the individual defendants' wilful, wanton and malicious interference with plaintiff's business relationship with Palos; Count VI alleges certain individual defendants' unfair competition with plaintiffs; Count VII alleges the individual defendants' intentional, wilful, wanton and malicious infliction of severe emotional distress upon plaintiffs. Plaintiffs prayed for, *inter alia*, preliminary and permanent injunctive relief requiring defendants to grant plaintiffs full medical staff privileges and compensatory and punitive damages of at least $500,000. At the close of all the evidence, the trial court directed verdicts on all counts against plaintiffs Lopez and Savage and on all counts but I and II in favor of all but Palos and several individual defendants and against plaintiff Knapp. The jury returned a verdict for Knapp on counts I and II and awarded damages of $400,000.

This opinion consolidates three separate appeals taken by the parties from: (1) the verdicts directed by the trial court against plaintiffs Lopez and Savage and its denial to all plaintiffs of a permanent injunction requiring Palos to grant plaintiffs staff privileges (Appeal No. 84-3004); (2) the judgment for plaintiff Knapp entered on the jury verdict in his favor (Appeal No. 85-0917); and (3) the award under section 11-110 of the Code of Civil Procedure (Ill. Rev. Stat. 1981, ch. 110, par. 11-110) to defendants for damages resulting from the wrongful issuance of the preliminary injunction vacated in *Knapp* I (Appeal No. 85-0218).

OPINION

Notwithstanding the voluminous and multifarious arguments of the parties, we believe that the one issue dispositive of Appeals 84-3004 and 85-0917 is whether the trial court erred in entertaining the causes of action pleaded seeking equitable and legal relief against the defendant

private hospital and the hospital's physicians, officers and directors. We believe that the trial court did err in entertaining plaintiffs' claims and requests for relief. In so doing, it violated the rule of limited judicial review of hospital medical staffing decisions established in *Jain v. Northwest Community Hospital* (1978), 67 Ill. App. 3d 420, 385 N.E.2d 108 and reaffirmed by relevant statutory law. We believe that the rule required the trial court to decline to exercise subject matter jurisdiction over plaintiffs' causes of action and requests for relief based thereon. On that basis, we (1) affirm the directed verdicts against plaintiffs Lopez and Savage and the denial to all plaintiffs of permanent injunctive relief; and (2) reverse the judgment and award of damages for plaintiff Knapp.

We recognize that "[o]ther than for jurisdictional reasons, a reviewing court should not normally search the record for unargued and unbriefed reasons to reverse a trial court judgment." (*Saldana v. Wirtz Cartage Co.* (1978), 74 Ill. 2d 379, 386, 385 N.E.2d 664.) However, we believe that our conclusion that the trial court should have declined to exercise its jurisdiction in this case is in the nature of a conclusion that it did not have jurisdiction here. We believe that, just as with our power to *sua sponte* conclude that the trial court had no jurisdiction in this case, our authority as a court of review to conclude that the trial court improperly exercised its jurisdiction cannot be denied. This conclusion is buttressed by the fact that we need not even search the record to find an improper exercise of jurisdiction as we believe that fact appears on the face of plaintiffs' second amended complaint. Also, while the ultimate basis for our disposition of these appeals, an improper exercise of jurisdiction, was not argued or briefed by the parties or the *amici curiae*, the Illinois Hospital Association and the Chicago Hospital Council, the underlying bases of that conclusion were argued and briefed by them.

"Subject matter jurisdiction" has been variously defined as the power of a court to hear and decide a particular case or controversy (*Dahl v. Grenier* (1984), 126 Ill. App.

3d 891, 467 N.E.2d 992), the power to hear and determine a class of cases and the power to grant the particular relief requested (*People ex rel. Illinois Department of Human Rights v. Arlington Park Race Track Corp.* (1984), 122 Ill. App. 3d 517, 461 N.E.2d 505), and the power of a particular court to hear the type of case that is then before it (*Lescher v. Barker* (1978), 57 Ill. App. 3d 776, 373 N.E.2d 1007). The sources of subject matter jurisdiction of the circuit courts are article 6, section 9 of the Illinois Constitution of 1970 and legislative enactments. (*Fredman Brothers Furniture Co. v. Department of Revenue* (1985), 109 Ill. 2d 202, 486 N.E.2d 893.) Obviously then, *Jain* could not abolish or limit the power of the trial court to hear and decide plaintiffs' causes of action or requests for relief.

However, we believe that *Jain* did, in effect, establish a rule requiring circuit courts to decline to exercise jurisdiction over the types of causes of action and requests for relief pleaded by plaintiffs based on Palos' decision regarding their membership on its medical staff. The decisions of an appellate court of any district are binding precedent on all circuit courts where there are no contrary rulings, although they are not binding upon appellate courts of other districts. *People v. Collings* (1981), 95 Ill. App. 3d 325, 420 N.E.2d 203.

Our conclusion that the trial court should have declined to exercise such jurisdiction over plaintiffs' claims is based primarily, but not exclusively, on a long line of Illinois cases, beginning with *Jain v. Northwest Community Hospital* (1978), 67 Ill. App. 3d 420, 385 N.E.2d 108. Illinois cases have repeatedly recognized that decisions of private hospitals respecting the termination, or curtailment of existing privileges of physicians on their medical staffs are subject only to a limited judicial review whose purpose is merely to determine whether such decisions were rendered in compliance with the bylaws of the institution. *Gates v. Holy Cross Hospital* (1988), ____ Ill. App. 3d ____, ____ N.E.2d ____; *Rodriguez-Erdman v. Ravenswood Hospital* (1987), 163 Ill. App. 3d 464, 516 N.E.2d 731;

Adkins v. Sarah Bush Lincoln Health Center (1987), 158 Ill. App. 3d 982, 511 N.E.2d 1267; *Barrows v. Northwestern Memorial Hospital* (1987), 153 Ill. App. 3d 83, 505 N.E.2d 1182, *rev'd on other grounds* (1988), 123 Ill. 2d 49, 525 N.E.2d 50; *Lapidot v. Memorial Medical* (1986), 144 Ill. App. 3d 141, 494 N.E.2d 838; *Rao v. St. Elizabeth's Hospital* (1986), 140 Ill. App. 3d 442, 488 N.E.2d 685; *Knapp v. Palos Community Hospital* (1984), 125 Ill. App. 3d 244, 465 N.E.2d 554; *Maimon v. Sisters of Third Order of St. Francis* (1983), 120 Ill. App. 3d 1090, 458 N.E.2d 1317; *Spencer v. Community Hospital of Evanston* (1980), 87 Ill. App. 3d 214, 408 N.E.2d 981; *Settler v. Hopedale Medical Foundation* (1980), 80 Ill. App. 3d 1074, 400 N.E.2d 577.

We recognize that, since *Jain*, courts of review have also passed upon, for instance, the issue whether physicians have adequately stated causes of action against private hospitals similar to those which plaintiffs pleaded against Palos. (See, *e.g.*: *Spencer v. Community Hospital of Evanston* (1980), 87 Ill. App. 3d 214, 408 N.E.2d 981 (cause of action for libel); *Adkins v. Sarah Bush Lincoln Health Center* (1987), 158 Ill. App. 3d 982, 511 N.E.2d 1267 (causes of action for wilful and malicious bylaw violations and for violation of Illinois Antitrust Act).) We also recognize that to the extent that they have done so they have implicitly recognized the right of a physician to bring such actions against a private hospital. However, we are convinced that the right of limited judicial review to determine compliance or noncompliance with bylaws means just that, *limited* judicial review.

The *Jain* court cited, *inter alia*, *Shulman v. Washington Hospital Center* (D.D.C. 1963), 222 F. Supp. 59, in articulating the rule of limited judicial review applicable in cases of this type. As the *amici curiae* point out, *Shulman* is one of the seminal cases in this area. It is therefore the best guide as to the meaning of the "limited" judicial review to which cases such as this are subject as that term was used in *Jain* and has been used since.

In *Shulman*, the plaintiff physician was not reappointed to the courtesy staff of the defendant private hospital. Seeking reinstatement to the staff, the plaintiff sued for an injunction, a declaratory judgment and damages for malicious defamation. (*Shulman*, 333 F. Supp. at 60.) In deciding whether a private hospital could appoint and remove members of its medical staff at will and could, at its discretion, exclude physicians from practicing in it, the court stated:

> "* * * The overwhelming weight of authority, almost approaching unanimity, is to the effect that such power and authority exist. The rule is well established that a private hospital has a right to exclude any physician from practicing therein. The action of hospital authorities in refusing to appoint a physician or surgeon to its medical staff, *or declining to renew an appointment that has expired*, or excluding any physician or surgeon from practising [*sic*] in the hospital, is not subject to judicial review. The decision of the hospital authorities in such matters is final.
>
> The only possible exception is in a case in which there is a failure to conform to procedural requirements set forth in its constitution, by-laws, or rules and regulations. *In that event, the extent of judicial review is to require compliance with the prescribed procedure. Beyond that, the courts do not interfere.* * * *." (Emphasis added.) *Shulman*, 222 F. Supp. at 63.

After reviewing the weight of authority supporting the rule, the court stated the rationale behind it:

> "There are sound reasons that lead the courts not to interfere in these matters. Judicial tribunals are not equipped to review the action of hospital authorities in selecting or refusing to appoint members of medical staffs, declining to renew appointments previously made, or excluding physicians or surgeons from hospital facilities. The authorities of a hospital necessarily and naturally endeavor to their utmost to serve in the best possible manner the sick and the afflicted

who knock at their door. Not all professional men, be they physicians, lawyers, or members of other professions, are of identical ability, competence, or experience, or of equal reliability, character, and standards of ethics. The mere fact that a person is admitted or licensed to practice his profession does not justify any inference beyond the conclusion that he has met the minimum requirements and possesses the minimum qualifications for that purpose. Necessarily hospitals endeavor to secure the most competent and experienced staff for their patients. * * * [T]he hospital in admitting a physician or surgeon to its facilities extends a moral imprimatur to him in the eyes of the public. Moreover not all professional men have a personality that enables them to work in harmony with others, and to inspire confidence in their fellows and in patients. These factors are of importance and here, too, there is room for selection. In matters such as these the courts are not in a position to substitute their judgment for that of professional groups.

* * *

The court is not unmindful * * * that due to the shortcomings of human nature, an occasional injustice may result, because of clashes of personality or temperament, possible likes and dislikes, jealousy or differences of opinion. The Courts, however, do not sit to remedy every ill caused by the frailties of mankind. Their function is but to vindicate legal rights and redress legal wrongs.

In view of the conclusion reached that the Court may not interpose to review the decision of the hospital in failing to renew the plaintiff's appointment * * *, no action lies against the corporation or its officers for a declaratory judgment or an injunction." (*Shulman*, 222 F. Supp. at 64-65.)

The court lastly found that the plaintiff failed to state a valid defamation claim against the individual defendants, officers of the hospital.

Thus, under the *Shulman* rule, which Illinois appellate courts have purported to follow since *Jain*, a physician claiming that a private hospital violated bylaws governing the procedure it was required to follow in rendering a decision regarding his staff privileges is merely entitled to relief requiring the hospital to comply with those bylaws before it renders its decision. In other words, the rule does not allow a trial court to entertain the types of claims prosecuted by plaintiffs against a private hospital for violating its bylaws, nor to grant equitable relief requiring the hospital to reinstate the plaintiff-physicians to its medical staff or legal relief against the hospital for violating its bylaws in terminating the physicians from its medical staff.

Moreover, we believe that *Jain* also barred plaintiffs from maintaining the causes of action pleaded against Palos against the individual defendants who participated in the decisions to terminate plaintiffs' staff privileges, *viz.*, physicians on the medical staff of Palos or employed by it to review plaintiffs' performance and the president as well as directors of Palos. To deny protection to the individual defendants would effectively deny protection to Palos since it can only act through individuals. *Settler v. Hopedale Medical Foundation* (1980), 80 Ill. App. 3d 1074, 1078, 400 N.E.2d 577.

In addition to *Jain*, we also base our conclusion that the trial court should have declined to exercise its jurisdiction in this case on Illinois statutory law which we believe reaffirms the limited review rule of *Jain*.

At the time of the peer review of plaintiffs in which the individual defendants participated, section 1 of "An Act providing for the confidential character of medical studies conducted by the Illinois Department of Public Health, Illinois State Medical Society, allied medical societies and committees of accredited hospitals, and providing a penalty for the violation thereof" (the Medical Studies Act) provided:

> "All information, interviews, reports, statements, memoranda or other data of * * * committees of accredited hospitals or their medical staffs, including Patient Care Audit Committees, Medical Care Evaluation Committees, Utilization Review Committees, Credential Committees and Executive Committees * * * used in the course of internal quality control * * * for improving patient care, shall be privileged, strictly confidential and shall be used only for * * * the evaluation and improvement of quality care, or granting, limiting or revoking staff privileges, except that in any hospital proceeding to decide upon a physician's staff privileges, or in any judicial review thereof, the claim of confidentiality shall not be invoked to deny such physician access to or use of data upon which such a decision was based." (Ill. Rev. Stat. 1981, ch. 51, par. 101.)

The purpose of this statute, now section 8-2101 of the Code of Civil Procedure (Code) (Ill. Rev. Stat. 1983, ch. 110 par. 8-2101), "is to ensure the effectiveness of professional self-evaluation, by members of the medical profession, in the interest of improving the quality of health care." It "is premised on the belief that, absent the statutory peer-review privilege, physicians would be reluctant to sit on peer-review committees and engage in frank evaluations of their colleagues." (*Jenkins v. Wu* (1984), 102 Ill. 2d 468, 482, 468 N.E.2d 1162.) Section 2 of the former Medical Studies Act, now section 8-2102 of the Code (Ill. Rev. Stat. 1983, ch. 110 par. 8-2102) provided:

> "Such information, records, reports, statements, notes, memoranda, or other data, shall not be admissible as evidence, nor discoverable in any action of any kind in any court before any tribunal, board, agency or person." (Ill. Rev. Stat. 1981, ch. 51, par. 102.)

We believe that sections 8-2101 and 8-2102 bestow upon those involved in a hospital's decisions to grant, revoke or limit staff privileges an absolute privilege insofar as

concerns their statements before the bodies involved in the peer-review process. As such, they prohibit the use of those statements in the type of causes of action prosecuted by plaintiffs against the individual defendants here.

As noted, section 8-2101 limits the access to or use of the data on which a decision regarding a physician's staff privileges was based to "any hospital proceeding to decide upon [such] privileges or * * * any judicial review thereof." In so doing, we believe section 8-2101 allows a judicial review limited to whether the hospital complied with its bylaws in taking such action. The quoted language was added by Pub. Act 81-476, eff. September 7, 1979 (1979 Ill. Laws 2040), after the decision of *Matviuw v. Johnson* (1979), 70 Ill. App. 3d 481, 388 N.E.2d 795. *Matviuw* held that section 1 of the Medical Studies Act construed therein, which did not then limit the permitted access to or use of the pertinent data, allowed a physician to use statements made to a peer review committee as a basis for a defamation suit. The court also held that section 2 of the statute did not bar the action since it fell within the unqualified exception to the general rule of confidentiality then provided in section 1. Significantly, in a subsequent appeal in the same case, the appellate court noted that this amendment and a second, making the data on which staff privileges decisions were based privileged and undiscoverable, would have rendered privileged the statements at issue if applicable to the case. *Matviuw v. Johnson* (1982), 111 Ill. App. 3d 629, 631-32, 444 N.E.2d 606. See also *Green v. Silver Cross Hospital* (N.D. Ill. 1984), 606 F. Supp. 87 (under the Medical Studies Act peer review hearing testimony was privileged and could not be basis for claims for defamation or tortious interference with business expectations).

It is presumed that the legislature, in adopting an amendment, was aware of judicial decisions concerning prior and existing law. (*Kozak v. Retirement Board of the Firemen's Annuity and Benefit Fund of Chicago* (1983), 95 Ill. 2d 211, 218, 447 N.E.2d 394.) It is therefore reasonable to conclude that this amendment to now section

8-2101 was a response to the first *Matviuw* decision. It is also reasonable to conclude that it was intended to make clear that the data on which staff privileges decisions were based, including statements of the peer review participants, was to be used only in the peer review process itself or a judicial review of that process limited in its scope to that established in *Jain*. This conclusion is buttressed by the observation that the amendment represents "an attempt by the legislature to safeguard the physician's right to due process" (*Jenkins v. Wu* (1984), 102 Ill. 2d 468, 482, 468 N.E.2d 1162), which concern is, we believe, at the heart of the limited review rule of *Shulman* and *Jain*.

Section 10.2 of the Hospital Licensing Act (Ill. Rev. Stat. 1985, ch. 111½, par. 142 *et seq.*) even more explicitly compels the conclusion that the claims prosecuted by plaintiffs against the individual defendants, as well as Palos, are not permitted under Illinois law. Section 10.2 provides:

> "No hospital and no individual who is a member of, agent or employee of a hospital, hospital medical staff hospital administrative staff, or hospital governing board shall be liable for civil damages as a result of the acts, omissions, decisions or any other conduct of a medical utilization committee, medical review committee, patient care audit committee, medical care evaluation committee, quality review committee, credential committee, peer review committee, or any other committee whose purpose, directly or indirectly, is internal quality control * * *, or for improving patient care within a hospital, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline." (Ill. Rev. Stat. 1985, ch. 111½, par. 151.2)

The legislative purpose of section 10.2, which immunizes hospitals and individuals from civil liability for their actions in the peer review process, is, "like that of section 8-2101, to foster effective self-policing by members of the

medical profession in matters unique to that profession and to thereby promote the legitimate State in improving the quality of health care in Illinois." (*Rodriguez-Erdman v. Ravenswood Hospital* (1987), 163 Ill. App. 3d 464, 516 N.E.2d 731.) The fact that section 10.2 became effective after the occurrence of the events at issue here does not make it inapplicable to this cause. *Rodriguez-Erdman*, 163 Ill. App. 3d at 471-72.

Moreover, we do not believe that section 2b of the Medical Practices Act (Ill. Rev. Stat. 1981, ch. 111, par. 4402 *et seq.*) vitiates the conclusion that Illinois law does not contemplate the type of claims prosecuted by plaintiffs here. Section 2b provides:

> "While serving upon any Medical Utilization Committee, Medical Review Committee, Patient Care Audit Committee, Medical Care Evaluation Committee, Quality Review Committee, Credential Committee, Peer Review Committee, or any other committee whose purpose, directly or indirectly, is internal quality control * * *, or for improving patient care within a hospital duly licensed under the Hospital Licensing Act, or the improving or benefiting of patient care and treatment, whether within a hospital or not, or for the purpose of professional discipline, any person serving on such committee, and any person providing service to such committees shall not be liable for civil damages as a result of his acts, omissions, decisions, or any other conduct in connection with his duties on such committees, except those involving wilful or wanton misconduct." (Ill. Rev. Stat. 1985, ch. 111, par. 4406.)

Parenthetically, we note that *Settler* held that an allegation of wilful and wanton misconduct against individual physicians, although not barred by section 2b, was nonetheless defeated by the rule of *Mauer v. Highland Park Hospital Foundation* (1967), 90 Ill. App. 2d 409, 232 N.E. 2d 776. *Mauer* established that a private hospital's refusal to appoint a physician in the first instance to is medical

staff was not subject to *any* judicial review. (*Mauer*, 90 Ill. App. 2d at 1076.) We do conclude, in contrast to *Settler*, that section 2b is irreconcilably inconsistent with sections 8-2101 and 8-2102 of the Code of Civil Procedure to the extent that it allows a claim of wilful and wanton misconduct to be based on oral or written statements made by physicians and others participating in the peer review process. That is, we do not see how a claim of wilful and wanton misconduct can be based on such statements under the Medical Practices Act while sections 8-2101 and 8-2102 simultaneously make them privileged, confidential, undiscoverable and inadmissible as evidence "in *any* action of *any* kind in *any* court."

Where two statutes conflict, the specific statute controls over the general statute. (*Sierra Club v. Kennedy* (1981), 88 Ill. 2d 110, 429 N.E.2d 1214.) Section 8-2101 renders statements made in the peer-review process confidential and privileged. It further provides an exception allowing access to and use of such statements in the peer-review process itself and a judicial review of that process. Further, section 8-2102 explicitly bars the discovery of such statements and makes them inadmissible "in any action of any kind in any court." Section 2b, on the other hand, provides an immunity from civil liability for peer-review participants and an exception to that immunity for wilful and wanton misconduct. We believe that, in their respective language, sections 8-2101 and 8-2102 are more specific than section 2b and thus are controlling over it.

The plain and unambiguous language of sections 8-2101 and 8-2102 admit of no exception to the bar contained therein and we do not believe we may read into it any exception for wilful and wanton misconduct. Our conclusion is reinforced by the similarly absolute and unconditional language of section 10.2 of the Hospital Licensing Act.

We believe that our conclusion that the trial court improperly exercised jurisdiction over this cause is dispositive of appeal 85-0218 as well. We therefore hold that the

trial court did not abuse its discretion in awarding damages to defendants for the wrongful issuance of the preliminary injunction entered in this case. However, independent of that determination, we also hold that this court's reversal in *Knapp* I of the order granting the preliminary injunction constituted a finding that the injunction had wrongfully issued. This is established beyond peradventure in *Buzz Barton & Associates, Inc. v. Giannone* (1985), 108 Ill. 2d 373, 483 N.E.2d 1271. *Barton* involved a reversal by the appellate court of an order granting a preliminary injunction on the ground that the trial court had abused its discretion because the plaintiff had failed to show a clearly ascertained right in need of protection. After receipt by the trial court of the appellate court's mandate, the defendants filed a petition for damages due to the wrongful issuance of the injunction, under section 11-110 of the Code of Civil Procedure (Ill. Rev. Stat. 1983, ch. 110, par. 11-110), based on the appellate court's holding. The defendants then appealed the trial court's order, holding section 11-110 unconstitutional, directly to the supreme court. In reversing that order, the court observed that damages under section 11-110 are imposed only where there is an adjudication that the preliminary injunction was wrongfully issued in the appellate court. As such, the court found plaintiff's claim that it did not have an opportunity to litigate that issue without merit. *Barton*, 108 Ill. 2d at 385.

Similarly here, plaintiffs' argument that there has been no finding that the preliminary injunction entered by the trial court was wrongfully issued is clearly untenable. This court found that the trial court had abused its discretion in entering the injunction because plaintiffs had failed to establish a likelihood of success on the merits. As the supreme court held in *Barton*, plaintiffs litigated the issue of the wrongful issuance of the injunction in the course of defendants' appeal from the trial court order and our holding constituted an adjudication that the injunction had wrongfully issued. Moreover, after this court's mandate was returned to the trial court upon the supreme court's

denial of leave to appeal, the trial court also entered an order dissolving the preliminary injunction pursuant to defendants' motion, contrary to plaintiffs' assertion that the court merely held that our mandate "was self-executing." Thus, whether based on our reversal of the order granting the preliminary injunction or its own order dissolving the injunction pursuant to our mandate, the trial court did not abuse its discretion in awarding defendants damages due to the wrongful issuance of the preliminary injunction under section 11-110 of the Code of Civil Procedure.

Moreover, the trial court's award of $50,510.60 plus interest was not against the manifest weight of the evidence. The testimony at the evidentiary hearing held on defendants' petition to assess damages, which plaintiffs incorrectly assert they were denied, amply supports the award and plaintiffs present no compelling arguments to hold otherwise. The award of damages entered by the trial court is affirmed.

For all of the foregoing reasons, the directed verdicts against plaintiffs Savage and Lopez on all counts, against plaintiff Knapp all counts but I and II and the denial to all plaintiffs of permanent injunctive relief is affirmed, the judgment entered on the jury verdict and the award to Dr. Knapp are reversed and the award to defendants of damages under section 11-110 of the Code of Civil Procedure is affirmed.

Affirmed in part; reversed in part.

WHITE, P.J., and RIZZI, J., concur.

APPENDIX C

WILLIAM B. KNAPP, M.D., *et al.*,
Plaintiffs-Appellees, *v.*
PALOS COMMUNITY HOSPITAL, *et al.*,
Defendants-Appellants.

First District (3rd Division) No. 82-2115

Order reversed.

Opinion filed June 13, 1984.

1. HOSPITALS, HOMES AND SANITARIUMS (§6)—*refusal of private hospital to reappoint physicians to staff is not subject to judicial review if bylaws are followed.* Private hospital's refusal to reappoint physician to its medical staff is not subject to judicial review so long as hospital acts pursuant to its own bylaws in matter.

2. HOSPITALS, HOMES AND SANITARIUMS (§7)—*record established that private hospital's refusal to reappoint physicians to staff was in compliance with bylaws.* Evidence presented clearly established that refusal of private hospital to reappoint several physicians to its medical staff was in full compliance with bylaws of hospital, notwithstanding alleged violations of various notice, evidentiary and procedural requirements, as physicians' performances were properly evaluated and required notices and hearings were conducted in accordance with bylaws.

3. HOSPITALS, HOMES AND SANITARIUMS (§7)—*trial court abused discretion in issuing preliminary injunction reinstating physicians to medical staff of hospital.* Preliminary injunction reinstating plaintiff physicians to medical staff was abuse of court's discretion, where plaintiffs failed to establish likelihood of success on merits in action against private hospital which acted in full compliance with its bylaws in determining not to reappoint plaintiffs to its staff so as to exempt such determination from judicial review.

Appeal from the Circuit Court of Cook County; the Hon. Richard L. Curry, Judge, presiding.

Hinshaw, Culbertson, Moelmann, Hoban & Fuller, of Chicago (D. Kendall Griffith, William J. Holloway and Michael R. Callahan, of counsel), for appellant the St. George Corporation.

Gregory A. Adamski, Stephen P. Carponelli, and Michael J. Weik, all of Chicago (Winston & Strawn and Carponelli & Krug, of counsel), for appellees.

McLaughlin, Kinser & Bryant, Schuyler, Ballard & Cowen, Harry L. Kinser, Kenneth C. Robbins, Jeffery W. Maysent, and Daniel M. Schuyler, all of Chicago, for *amici curiae* Illinois Hospital Association and the Chicago Hospital Council.

JUSTICE McGILLICUDDY delivered the opinion of the court:

On January 27, 1982, the plaintiffs, William B. Knapp, M.D.; Francisco Lopez, M.D.; Hugh Savage, M.D.; and Dr. William B. Knapp & Associates brought this action for injunctive relief alleging wrongful curtailment of medical staff privileges against the defendants, Palos Community Hospital; the St. George Corporation; Sister Margaret Wright; Thomas Lavery; Carlo Fioretti, M.D.; Terrance Moisan, M.D.; and Dr. Adams. On July 15, 1982, the trial court entered a temporary restraining order enjoining the defendants from denying the plaintiffs reappointment to the medical staff. On July 20, 1982, the plaintiffs amended the complaint to allege that Palos had violated its bylaws in denying reappointment. The amended complaint also joined Kenneth Wilcox, M.D.; S. Katapodis, M.D.; Y. Normanboy, M.D.; Z. Risvi, M.D.; T. Arvyoa, M.D.; John Kline, M.D.; N. Henry Coleman, M.D.; Roland Winterfield, M.D.; David Scheiner, M.D.; and S. Caliendo, M.D., as additional defendants. On July 30, 1982, following a five-day hearing, the trial court dissolved the temporary restraining order of July 15, 1982, and entered a preliminary injunction reinstating the plaintiffs to the

medical staff with full privileges. The St. George Corporation, d/b/a Palos Community Hospital (Palos), brought this interlocutory appeal. The issues presented for review are whether the trial court abused its discretion in entering the preliminary injunction and whether the hospital violated its bylaws in not reappointing the plaintiffs to the medical staff.

The plaintiffs, specialists in internal medicine, practice as a group at Palos. Dr. Knapp joined the Palos staff in 1972, Dr. Lopez in 1975 and Dr. Savage in 1977. Each plaintiff also enjoys staff privileges at Mercy Hospital and Medical Center in Chicago, Little Company of Mary Hospital in Evergreen Park and Suburban Hospital and Sanitarium of Cook County in Hinsdale. The plaintiffs have an office in Evergreen Park.

Palos is a private hospital located in Palos Heights, Illinois. It is owned and operated by the St. George Corporation, a not-for-profit organization. Sister Wright, the president and chief executive officer of Palos, reports directly to the St. George Corporation Board of Directors (Board).

The Joint Commission on the Accreditation of Hospitals requires quarterly audits of the hospital's respiratory care services. Accordingly, among the four audits conducted at Palos in 1981 was an ancillary services audit of ventilatory care by Dr. Moisan, Palos' director of respiratory therapy, and Dr. Adams (the Moisan audit). Ventilatory care deals with the circulation and exchange of gases in the lungs that is basic to respiration. The Moisan audit reviewed the medical records of patients who had received ventilatory care treatment from 11 physicians from January through June 1981. Of 33 deficiencies found, 17 were in the charts of the plaintiffs' patients.

On November 16, 1981, Palos' intensive care committee reviewed the Moisan audit results and voted to recommend that ventilatory privileges be separately delineated on a privilege card for each physician on the staff. Dr. Savage participated in the meeting.

On November 18, 1981, the Moisan audit results were presented at a department of medicine meeting which the three plaintiffs attended. The department of medicine voted to approve the recommendation of the intensive care committee.

On November 19, 1981, the quality assurance committee (also known as the utilization review committee) voted to accept the Moisan audit. The committee adopted a motion recommending that Dr. Fioretti, Chairman, notify the physician with the greatest number of deficiencies that all orders for mechanical ventilation would be concurrently reviewed by Dr. Moisan or Dr. Adams.

There is conflicting testimony as to what happened at this meeting. According to Dr. Knapp, he protested upon learning of the Moisan audit and demanded to know the numbers of the charts, the names of the patients, and the deficiencies and their relations to the charts. He testified that he did not discover the chart numbers at issue until February 15, 1982. Dr. Moisan countered that Dr. Knapp did not request identification of the chart numbers included in the audit at the meeting, but that if he had, Dr. Moisan would have furnished the numbers. Dr. Moisan also testified that he had volunteered to give the charts or chart numbers to the plaintiffs. The five charts in question were on the table during the meeting.

The medical executive committee met on November 24, 1981, and approved the intensive care committee's recommendation to list ventilatory privileges on the privilege cards. It was noted that since these privileges have never been assigned in the past, "one cannot consider that they are being denied to anyone at this time."

On December 11, 1981, the recommendation of the quality assurance committee regarding review of ventilation orders was incorporated in a letter to Dr. Knapp. The letter stated, in relevant part, as follows:

> "It was moved and carried that a letter be forwarded to your attention informing you that your

group's charts had the greatest number of deficiencies, and in view of the findings of this audit all orders for mechanical ventilation will be concurrently reviewed by Dr. Moisan or Dr. Adams.

In as much [*sic*] as Dr. Moisan has a contractual [*sic*] relationship with the hospital, he has the authority to change any orders that are inappropriate. Dr. Moisan has been instructed to intervene on behalf of any patient on any mechanical ventilation in situations where management is inappropriate, deficient or dangerous. Should there be a need to intervene, you will be informed. Should there be a conflict, it will be resolved by Administration and the Department of Medicine."

At the next meeting of the medical executive committee on December 22, 1981, Dr. Murphy read a letter from Dr. Knapp protesting the quality assurance committee's decision to have his ventilatory orders monitored. He asserted that he had never been notified of the deficiencies in his patients' charts prior to the monitoring and that his right to due process had been violated. It was noted that members of Dr. Knapp's group attended the meetings of the quality assurance committee and department of medicine when the audit was presented. Following discussion, the committee decided to advise Dr. Knapp that it was the opinion of the executive committee that the audit was appropriately reviewed and approved, that no privileges of any physician were restricted, and that ventilatory privileges would be added to the privilege card and would be reviewed for the first time during the annual reappointment process.

Dr. Savage, Dr. Moisan, medical affairs vice-president Thomas Lavery, and medical staff president Dr. Rodolfo Mejicano met on December 23, 1981, to resolve any problems with the parties involved and to institute a mechanism for the review of the plaintiffs' ventilatory orders. Dr. Moisan testified that he brought the charts in question to the meeting and offered them to Dr. Savage. Dr.

Savage declined to review them and said he was not interested at that time in going over them. Dr. Moisan further testified that Dr. Savage said he understood Dr. Moisan's observations of the audit, and realized there would be no interference with his ability to write ventilatory orders. According to Dr. Mejicano's testimony, Dr. Savage agreed that any conflict between one of the plaintiffs and the lung therapist would be resolved by Dr. Moisan or Dr. Mejicano. Dr. Knapp testified that Dr. Savage was acting on behalf of the three plaintiffs at this meeting. The arrangements made at the meeting were confirmed by Lavery and Dr. Savage on December 28, 1981.

Palos' bylaws authorize a peer review system to evaluate quality of medical care and to annually reappoint the members of its medical staff, subject to the ultimate authority of the Board. The reappointment procedure begins with the medical staff which, through appropriate committees, considers each application for reappointment and transmits its findings to the Board. The criteria used for the evaluation of each physician include, *inter alia*, direct observation of care provided by review of patients' records and medical staff records; determination to adhere strictly to professional ethics, to work cooperatively with others and to be willing to participate in the discharge of staff responsibilities; provision of quality medical care to patients; and participation in the patient care audit, utilization review and other medical quality maintenance activities.

The bylaws require an initial review of all pertinent information available on each practitioner by the privilege evaluation committee of each department. The privilege evaluation committee makes recommendations as to reappointment, promotion and granting of clinical privileges of each practitioner to the department chairman. The members of the department review the recommendations and by majority vote approve or disapprove them. The chairman then submits the privilege evaluation committee recommendations and the department conclusions to the medical executive committee.

Following review of those recommendations and conclusions, the medical executive committee makes findings, which findings if favorable to the practitioner, are forwarded to the Board. If the findings are adverse to the practitioner with respect to reappointment, classification or clinical privileges, the affected practitioner is entitled to notice and a hearing as provided by article IX of the bylaws.

Article IX of the bylaws allows a practitioner to request a hearing within 30 days after receipt of notice of any initial adverse decision. The hearing is held before an *ad hoc* hearing panel of five persons, three of whom must be practitioners. Within 14 days after receipt of a written request for a hearing, the medical executive committee schedules the hearing for not less than 21 nor more than 42 days from the receipt of the request. The president notifies the practitioner of the time, date and place of the hearing, as well as the acts or omissions with which he is being charged, a list of specific or representative charts being questioned, and/or other reasons or subject matter that were considered in making the adverse decision.

The bylaws grant participants the rights to present and examine witnesses, question witnesses presented by others on relevant matters, and introduce oral and documentary evidence. The hearing committee may actively participate in the proceedings and shall deliberate outside the presence of the other participants. Within 14 days of the hearing, the hearing committee shall report in writing its decision and findings to the medical executive committee or to the Board and to the affected practitioner. The report shall include the recommendations of the hearing committee to affirm, modify or reject the initial adverse decision, with supporting documentation.

If the hearing committee's decision is adverse to the practitioner, he may request in writing an appellate review within 14 days of receipt of notice of the decision. This review is conducted by at least five disinterested per-

sons appointed by the chairman of the Board. The practitioner has access to reports and all material considered by the hearing committee. He may also submit a written statement on his own behalf which shall specify the areas of disagreement and the practitioner's reasons. The appellate review committee has the responsibility to determine whether the adverse decision against the practitioner was justified. Within 14 days after the completion of the review, the committee shall report in writing to the Board its recommendation to affirm, modify or reverse the adverse decision, the basis for such recommendation, and supporting documentation. Within 21 days of the appellate review, the Board takes final action on the matter and notice thereof shall be sent to the practitioner.

On January 27, 1982, the department of medicine privilege evaluation committee began the annual review process by considering the plaintiffs' applications for reappointment to the medical staff. The privilege evaluation committee approved the applications except as to ventilation therapy privileges. The privilege evaluation committee voted to recommend the reappointments and deferred discussion of the ventilation question and the Moisan audit to its next meeting.

Also on January 27, 1982, the plaintiffs filed a complaint in the circuit court of Cook County against Palos, the St. George Corporation, Sister Margaret Wright, Thomas Lavery, Dr. Fioretti, Dr. Moisan and Dr. Adams. The complaint alleged that the plaintiffs' privileges to write ventilation orders were curtailed by the action of the quality assurance committee, that the action taken violated Palos' bylaws, and that the defendants' action was wrongful.

The next privilege evaluation committee meeting took place on February 10, 1982. As a result of a motion made, seconded and carried, Dr. Lopez was not permitted to tape record the meeting. Dr. Moisan announced that since the plaintiffs had filed a lawsuit, he would be unable to discuss their ventilation privileges. Sister Wright described

the complaint filed in the circuit court by the plaintiffs and announced that, in the interest of impartiality, Palos had sought external review of the medical care rendered by the plaintiffs. She reported that Dr. David L. Scheiner of Michael Reese Hospital and Pritzker School of Medicine, hired as a consultant, had reviewed various charts of the plaintiffs' group and reported that their practice had fallen sharply below accepted standards of medical care. Sister Wright suggested that the external review be given serious consideration and recommended that the plaintiffs' applications for reappointment be denied.

Dr. Lopez objected, stating that the audit and charts examined by Dr. Scheiner had never been presented to him for review. It was pointed out that Dr. Lopez and every other privilege evaluation committee member had access to the charts scheduled for review prior to the meeting. Sister Wright advised that the availability of the charts would be discontinued on advice of legal counsel due to the pending lawsuit. Dr. Moisan stated that the issue was overall quality of care as well as ventilatory privileges. The committee agreed to make the reports and charts which were reviewed by Dr. Scheiner available to its members. No one reviewed any charts during the meeting.

Dr. Moisan made a motion that the plaintiffs not be reappointed to the staff; Dr. Kline seconded the motion. During the ensuing discussion, it was pointed out that for certain diagnoses, the plaintiffs' overutilization of the hospital resulted in hospitalizations that were 50% longer and costs that were 31% greater than those of the other staff members. Two committee members, Drs. Moisan and Kline, voted to deny reappointment. Two members abstained from voting. Dr. Mejicano did not vote and he stated that he was required to vote only to break a tie vote. Sister Wright did not vote. Dr. Lopez was not allowed to vote. Dr. Mejicano testified that he had not encountered another situation where a committee member was not allowed to vote on his own privilege form. He believed the committee members felt pressure from Sister

Wright to vote again on the applications. The privilege evaluation committee recommendations to deny the plaintiffs' reappointment were forwarded to the department of medicine.

On February 18, 1982, the department of medicine considered the plaintiffs' applications for reappointment and the privilege evaluation committee recommendations that they be denied. Dr. Knapp read a memorandum from the plaintiffs to the department of medicine which criticized the recommendations, the Moisan audit, and the Palos administration and peer review system. Dr. Moisan stated that he monitors all ventilatory care without fee to the physicians, most of whom appreciate the service, pursuant to a contract with the Board. He added that at no time were the plaintiffs informed that they could not write orders for ventilatory care.

Although the Moisan audit and Dr. Scheiner's report were not reviewed at the meeting, at least four of the voting members (Drs. Winterfield, Coleman, O'Reilly and Kline) had examined them prior to that time. The charts evaluated by Dr. Scheiner were there, but no one looked at them. Dr. McCormick testified that, except for two new physicians, each member of the department of medicine staff has belonged to one of the hospital's peer review committees and has had ample opportunity to examine the plaintiffs' patients' charts. The issue of the standard of care practiced by the plaintiffs was then discussed.

The department of medicine went into executive session, excluding the parties to the lawsuit (Lavery, Sister Wright, and Drs. Knapp, Lopez and Savage), Drs. Moisan and Adams, and the secretary. In executive session, the members discussed the plaintiffs' quality of care, including inappropriate use of lung scans and medications; excessive use of diagnostic tests, pacemakers and pulmonary angiograms; unsubstantiated diagnoses; and improper testing and treatment. Specific charts were not discussed. After the executive session the excluded persons were called back to the meeting. The department of medicine, by a

majority vote, recommended that the plaintiffs' applications for reappointment be denied.

At a meeting of the medical executive committee on February 23, 1982, there was a discussion and a review of the department of medicine recommendations that the plaintiffs not be reappointed to the medical staff. The plaintiffs had submitted a report outlining their complaints to the medical executive committee. The medical executive committee voted, by a majority, to deny the plaintiffs' applications for reappointment.

On February 23, 1982, Sister Wright notified the plaintiffs as follows:

> "Pursuant to Article VI, 'Medical Staff Reappointment,' Section 3 — *Medical Executive Committee Action*, I am notifying you that the Medical Executive Committee voted to not reappoint you to the Medical Staff of Palos Community Hospital. Section 3 states: * * * 'the affected practitioner shall be entitled to notice and a hearing as provided by Article IX of these Bylaws.'
>
> Please consider this letter formal notice of an adverse decision with regard to your appointment, and notification of your right to a hearing as stated in Article IX, 'hearing and Appellate Review', Section 5 — *Request for a Hearing.* Section 5 states:
>
> '(a) The president shall be responsible for the giving of prompt written notice of an adverse decision to any affected practitioner who is entitled to a hearing or appellate review.
>
> (b) A practitioner who fails to make a written request for a hearing within 30 days after receipt of the notice above provided shall be deemed to have waived his right to a hearing and all subsequent rights for a hearing and/or appellate review.' "

On March 10, 1982, Sister Wright received the following letter dated March 1, 1982, from the plaintiffs:

> "[W]e received your notice of adverse action by the Executive Committee and demand all rights, hearings, and appeals pursuant to the By-Laws. Please contact [us] to determine a mutually convenient date for the hearing, to advise [us] of the issues before the hearing committee, to provide [us] with all documents that will be considered before the hearing committee, to advise [us] concerning the members of the hearing committee, and to provide [us] with a list of witnesses that will be called before the hearing Committee."

She notified them on March 23, 1982, that the hearing would be held on April 7, 1982. The notice included six specific charges (overutilization of the hospital, overutilization of tests, inappropriate use of medication, inappropriate use of lung scans, unsubstantiated diagnoses and inadequate ventilatory management) and a representative list of the 38 charts which had been examined by Dr. Scheiner and Dr. Moisan or had been discussed at departmental meetings.

On April 1, 1982, in response to the Moisan audit and the increased complexity of mechanical ventilators, Palos instituted a new requirement that all physicians specifically qualify for the privilege of writing ventilation orders.

On April 8, 1982, the *ad hoc* hearing panel conducted a hearing. The plaintiffs and Palos were represented by legal counsel. Dr. Wilcox of the medical executive committee described the proceedings to date. A discussion ensued and memoranda prepared by the plaintiffs were accepted for consideration. Individual charts were not reviewed. Dr. Lopez conceded that the hospital may audit any doctor without notifying him until a deviation is found. During the meeting, he requested and was denied a continuance. Dr. Wilcox stated that the charges against the plaintiffs were based on the observations of their methods of practice by their peers over a 10-year period. Dr. Knapp accused the hospital of harassing his group for 10 years. The committee subsequently met at an executive

session and, after discussion, voted unanimously to affirm the recommendations of the medical executive committee that the plaintiffs not be reappointed.

On April 27, 1982, the medical executive committee reviewed the report of the *ad hoc* hearing panel and the supporting documents. The medical executive committee confirmed the recommendations for non-reappointment of the plaintiffs.

On April 30, 1982, after consideration of the recommendations and documentary evidence including the Moisan and Scheiner audits, the Board voted not to reappoint the plaintiffs to the medical staff. On the same day, Sister Wright sent the following letter to the plaintiffs advising them of the Board's decision:

> "In accordance with the Medical Staff Bylaws, Article VI, Section 3, I am hereby notifying you that the Board of Directors has voted not to reappoint you to the Medical Staff of Palos Community Hospital.
>
> This letter is the formal notice of the Board's adverse decision regarding your reappointment and also serves as notification of your right to a hearing as stated in Article IX of the Medical Staff Bylaws. As stated in the aforementioned Bylaws:
>
> > '(a) The president shall be responsible for a giving of prompt written notice of an adverse decision to any affected practitioner who is entitled to a hearing or appellate review.
> >
> > (b) A practitioner who fails to make written request for a hearing within 30 days after receipt of the notice above provided shall be deemed to have waived his right to a hearing and all subsequent rights to a hearing or appellate review.' "

On May 25, 1982, Sister Wright received the following letter dated May 21, 1982, from plaintiff Dr. Savage:

"Dear Sister Wright:

I received your April 30, 1982 letter notifying me that the Board of Directors has voted not to reappoint me to the medical staff of Palos Community Hospital. I protest this decision and hereby make written request for a hearing pursuant to the Bylaws."

On June 7, 1982, Sister Wright sent the following letter to the plaintiffs:

"Please be advised that in response to your request of May 21, 1982, an Appellate Review Committee ('the Committee') will be convened pursuant to Article IX, Section 10 of the Medical Staff Bylaws, to consider the adverse decision by the Board of Directors of Palos Community Hospital, not to reappoint you to the medical staff.

The Committee will meet on June 18, 1982, at 9:00 a.m. in the Board Room of Palos Community Hospital, 80th Avenue at McCarthy Road, Palos Heights, Illinois.

The Committee will be selected in accordance with Article IX, Section 10(d) of the Medical Staff Bylaws, and you will be given their names as soon as they are appointed.

Prior to the meeting, you have the right to review all reports, records, transcripts and any other materials that were considered by the Ad Hoc Hearing Panel which considered your reappointment at the hearing on April 7, 1982. You may also submit a written statement presenting arguments on your behalf. To ensure that the record is complete and that you are given every opportunity to present your case, you may also submit to the Committee any other material that you believe supports your position.

Please be advised that as set forth in Article IX, Section 1, pending completion of this review process, your medical staff privileges shall continue unchanged.

Should you have any questions or comments regarding any aspect of this letter or the conduct of the Appellate Review you have requested, please do not hesitate to raise them prior to the meeting. Communications from your attorney should be directed to the attorney for the Hospital as follows:

E. Michael Kelly, Esq.
Hinshaw, Culbertson, Moelmann, Hoban & Fuller
69 West Washington Street
Chicago, Illinois 60602
(312) 630-3224."

The appellate review committee met on June 18, 1982, and heard allegations from the plaintiffs' attorney that the plaintiffs' rights as well as the Palos bylaws had been violated. Drs. Knapp and Savage made statements to the committee. The committee granted to the plaintiffs an additional 21 days in which to make any further oral or written presentations.

On July 9, 1982, the appellate review committee convened again and accepted a memorandum from the plaintiffs which urged that they be reappointed to the medical staff and alleged violations of their rights. The committee went into executive session and voted unanimously in favor of nonreappointment of the plaintiffs.

On July 14, 1982, the Board of Directors voted not to reappoint the plaintiffs to the medical staff. The plaintiffs were immediately notified of the Board's action.

On July 15, 1982, the trial court entered a temporary restraining order enjoining the defendants from denying the plaintiffs full staff privileges at Palos with the exception of ventilatory therapy.

The plaintiffs filed an amended complaint in circuit court on July 20, 1982, alleging that Palos had violated its bylaws in not reappointing them to its staff. The amended complaint joined as defendants Dr. Scheiner and nine physicians on the committees in the peer review process.

On July 30, 1982, after a five-day hearing, the trial court dissolved the temporary restraining order and entered a preliminary injunction reinstating the plaintiffs to the medical staff with full privileges as had existed on January 27, 1982. The trial court incorporated into its order the court's findings of fact and conclusions of law which it made on July 29, 1982. In light of the April 1, 1982, hospital requirement regarding ventilatory privileges, the injunction placed the plaintiffs in the position of being the only three doctors on the medical staff able to write ventilation orders without being specifically qualified.

Palos contends that the trial court abused its discretion in granting the injunction because the hospital did not violate its bylaws in not reappointing the plaintiffs to its staff. The granting of a temporary injunction is within the sound discretion of the trial court, and unless there is an abuse of discretion, the reviewing court will not set it aside. (*Lonergan v. Crucible Steel Co. of America* (1967), 37 Ill. 2d 599, 229 N.E.2d 536; *Houseknecht v. Zagel* (1983), 112 Ill. App. 3d 284, 445 N.E.2d 402.) In order that a preliminary injunction may issue, the plaintiff must establish by a preponderance of the evidence that (1) a certain and clearly ascertained right needs protection, (2) irreparable injury will occur without the injunction, (3) no adequate remedy at law exists, and (4) there is probability of success on the merits of the case. *Hydroaire, Inc. v. Sager* (1981), 98 Ill. App. 3d 758, 424 N.E.2d 719.

•1 It is well established that a private hospital's refusal to appoint a physician to its medical staff is not subject to judicial review. (*Settler v. Hopedale Medical Foundation* (1980), 80 Ill. App. 3d 1074, 400 N.E.2d 577; *Jain v. Northwest Community Hospital* (1978), 67 Ill. App. 3d 420, 385 N.E.2d 108.) The rationale behind this rule is the court's unwillingness to substitute its judgment for that of private hospital authorities. (*Jain v. Northwest Community Hospital* (1978), 67 Ill. App. 3d 420, 385 N.E. 2d 108.) The only exception to the rule on non-review that has developed in Illinois is that where a physician's exist-

ing staff privileges are revoked or reduced, a private hospital must follow its own bylaws in doing so or be subject to limited judicial review. *Jain v. Northwest Community Hospital* (1978), 67 Ill. App. 3d 420, 385 N.E.2d 108.

•2 The facts in the instant case indicate full compliance with the hospital bylaws. The evidence shows that the plaintiffs' performances were evaluated in their annual review by the privilege evaluation committee, the department of medicine, and the medical executive committee. At the plaintiffs' request and in accordance with the bylaws, the decision of the medical executive committee was reviewed by an *ad hoc* hearing panel. The panel voted unanimously to affirm the recommendations of the medical executive committee that the plaintiffs not be reappointed. When that result was forwarded to the Board and the Board confirmed it, the plaintiffs were immediately notified. The plaintiffs requested and were granted appellate review. All of these events took place in accordance with and in full satisfaction of the bylaw requirements.

The plaintiffs allege seven specific bylaw violations. First, they charge that no committee reviewed any charts of their patients, in violation of article VII, section 1(c). Article VII, section 1(c) provides that periodic redetermination of clinical privileges shall be based on direct observation of care provided by review of patients' records, medical staff records and other pertinent information. As the members of every committee in the peer review process had access to the patients' charts, and discussed the charts, the Moisan audit, Dr. Scheiner's report and their own observations, there was no violation of article VII, section 1(c).

Second, the plaintiffs complain they were not given notice of or hearings on the adverse decisions made at the February 10, 1982, privilege evaluation committee meeting, the February 18, 1982, department of medicine meeting or the February 23, 1982, medical executive committee meeting, in violation of article IX, section 3. That

provision grants the right to request a hearing to a practitioner who has received notice of an initial adverse decision affecting his status or clinical privileges. The results of the privilege evaluation committee and department of medicine meetings were nonbinding recommendations for the consideration of the medical executive committee. They had no effect on the plaintiffs' status or clinical privileges. Thus they did not give rise to any right to notice or a hearing. As to the medical executive committee meeting, contrary to the plaintiffs' assertion, Sister Wright sent them notice in writing of the adverse decision made by the medical executive committee on the day it was made, February 23, 1982. The plaintiffs sent a letter dated March 1, 1982, which was received on March 10, 1982, requesting a hearing. On March 23, 1982, Sister Wright advised the plaintiffs that the hearing would be on April 7, 1982. Article IX, section 3 was not violated.

Third, the plaintiffs contend that no committee issued findings adverse to them, in violation of certain bylaws. The evidence indicates that on February 23, 1982, the medical executive committee reviewed the recommendations of the department of medicine and reviewed plaintiffs' report outlining their complaints. The medical executive committee then made a finding adverse to the plaintiffs as indicated by the majority vote of the committee to deny the plaintiffs' applications for reappointment.

The evidence further discloses that on April 27, 1982, the medical executive committee reviewed the report of the *ad hoc* hearing panel and the supporting documents. The committee confirmed the recommendations for nonreappointment of the plaintiffs.

Fourth, the plaintiffs assert that the hearing of the *ad hoc* hearing panel and the appellate hearing were not conducted within the time limits set forth in article IX, sections 6(a) and 10. Section 6(a) provides that the hearings must be scheduled within 14 days after receipt of the practitioner's written request for the hearing, and the hearing must be held not less than 21 days nor more than

42 days from the date the request is received. Section 10 provides that a practitioner shall have 14 days to request in writing an appellate review after his receipt of notice of the adverse action. Sister Wright received the plaintiffs' request for an *ad hoc* hearing on March 10, 1982. On March 23, 1982, she notified them of the hearing scheduled for April 7, 1982. This notification was within 14 days of the receipt of the request for a hearing. The hearing was held on April 8, 1982, 29 days from the date of the receipt of the request. Sister Wright received the plaintiffs' request for appellate review on May 25, 1982. She informed them 13 days later, on June 7, 1982, that the appellate review was scheduled for June 18, 1982. The appellate review committee met on June 18, 1982, 24 days from the receipt of the request. There was no violation of the bylaws.

Fifth, the plaintiffs allege that the bill of particulars they received was "grossly inadequate" in violation of article IX, section 9(b). There is no section 9(b) to article IX. Article IX, section 9B, deals with witnesses and evidence at the *ad hoc* hearing. However, article IX, section 6(b), is the only bylaw which addresses a "bill of particulars." It requires that the practitioner receive notice of the acts or omissions with which he is being charged, a list of specific or representative charts being questioned, and/or other reasons or subject matter that was considered in making the adverse decision. The plaintiffs received notice of six specific charges and a list of the 38 charts being questioned. There was no violation of the bylaws.

Sixth, the plaintiffs contend that they were not allowed to examine witnesses at the *ad hoc* hearing in violation of article IX, section 9(b) [*sic*]. Article IX, section 9B grants participants the right to question each other's witnesses. The plaintiffs are apparently referring to a question Dr. Lopez put to Dr. Wilcox. At the request of the medical executive committee and the medical staff, Dr. Wilcox read a report of the charges, the allegations and the proceedings to date. At the conclusion of Dr. Wilcox' report, Dr. Lopez inquired as to whether Dr. Wilcox was

present at the January 1982 privilege evaluation committee meeting. Dr. Wilcox responded that he was not present at that meeting. Dr. Caliendo stated that as Dr. Wilcox had merely read a report, it would be inappropriate to question him individually. Dr. Lopez said, "Okay," and instead presented minutes of that privilege evaluation committee meeting. There was no substantial violation of article IX, section 9B.

Finally, the plaintiffs complain that they were not allowed to discuss their charts at the *ad hoc* hearing, in violation of article IX, section 9(b) [*sic*]. Article IX, section 9B, grants participants the right to introduce relevant oral and documentary evidence. Dr. Caliendo announced that individual charts would not be examined at the meeting. According to the transcript of the meeting, the plaintiffs' patients' charts, as well as the audit and report based thereon, were mentioned several times by the plaintiffs and the other participants during the hearing. At the hearing, there was no request made to discuss the plaintiffs' charts. There was no substantial violation of article IX, section 9B.

The plaintiffs further allege that their right to regular procedures as established by custom, usage and practice has been violated. As we have noted, any private hospital action which does not violate its bylaws is beyond the scope of judicial review.

•3 As Palos did not violate its bylaws in not reappointing the plaintiffs to its medical staff, its actions are not subject to judicial review. The plaintiffs have not established a likelihood of success on the merits of their case. For these reasons, the trial court abused its discretion in granting the preliminary injunction.

For the foregoing reasons, the order of the circuit court of Cook County is reversed.

Reversed.

RIZZI, P.J., and O'CONNOR, J., concur.